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DECISIONS OF THE WAR DEPARTMENT BOARD OF CONTRACT ADJUSTMENT

VOLUME III

January 10 to February 28, 1920

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NOTE.

The name of Col. Herbert H. Lehman, who was a member of the Board of Contract Adjustment from November 6, 1918, to June 2, 1919, was omitted through inadvertance from the statement of members contained in the first volume of the decisions of this Board.

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Case No. 602.

In re **MATTER OF B. F. GOODRICH RUBBER CO.**

- 1. ALLOCATIONS—WAR INDUSTRIES BOARD.**—Where a representative of the War Industries Board, acting under the direction of the Chief Signal Officer, gives an order to contractor on the faith of which such contractor makes an allocation of material, the agreement is made within the authority, direction, or instruction of the Secretary of War within the meaning of the act of March 2, 1919.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$1,721.28, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The papers in the case were referred to this Board by the Claims Board, Director of Purchase, for the reason that it was determined by said Claims Board that the agreement alleged to have been made herein was made by LeRoy Clark, chief of the wire and cable section of the War Industries Board, and not by an officer of the Signal Corps. The executive board of the Signal Corps was at this time composed of Brig. Gen. C. McK. Saltzman, executive officer, and six other officers of the Army, who met daily, each of said officers being responsible for a division of Signal Corps activities, including all of the Signal Corps organization.

3. At the meeting of August 22, 1918, it was necessary for the Board to determine a definite course of action to largely increase the supply of insulated copper wire for the overseas forces, and owing to the importance of the subject the chief signal officer, Maj. Gen. G. O. Squier, was present. LeRoy Clark, chairman of the insulated wire and cable committee of the War Industries Board, was also present.

4. The Signal Corps requirements for insulated wire for communication work at this time involved the entire industry in the United States and exceeded the combined capacity of all plants in the United States; and for practically the entire period of the war

all orders for wire were allocated by the wire and cable committee of the War Industries Board, through Mr. Clark.

5. Up to the date of the meeting of August 22, 1918, an attempt had been made to meet requirements by utilizing a copper-clad wire in common use by telephone companies, and the Signal Corps had procured all such wire available, both in warehouses and factories in the United States, and had taken over all contracts for this production in wire factories, and had also placed orders for additional capacity. However, not even this action proved sufficient to meet requirements; and Le Roy Clark suggested that No. 14 B. and S. hard-drawn copper could also be produced or procured until the production of the standard Signal Corps wire for outpost use was sufficient to meet the demand.

Thereupon Mr. Clark was instructed by the Chief Signal Officer to use every measure in his power to secure a maximum immediate production of No. 14 B. and S. hard-drawn copper, providing it did not interfere with other wire production, and the executive officer of the procurement division, Maj. R. A. Klock, was instructed to cooperate with Mr. Clark and insure the shipment of this wire with all possible speed. The method employed in procuring this wire was as follows:

(a) Mr. Clark, through the War Industries Board, determined upon facilities and made arrangements by telegraph with the manufacturers to produce it.

(b) Procurement representatives talked with Mr. Clark as to price and details of shipment.

(c) The contracting officer assigned order numbers, secured the necessary priority for the manufacturers selected, telegraphed the order number and such other data as was necessary. In those cases where the manufacturer had the necessary materials telegraphing priority was not required, the order number being furnished to Mr. Clark and transmitted to the contractor by him.

(d) Upon receipt of full data as to quantity, point of origin, price, etc., formal order was placed and contract was prepared.

6. From the foregoing procedure it will be noted that conditions made it imperative that production should be started as rapidly as possible in the greatest quantity available, and it was understood both by the contractors and the Signal Corps that Mr. Clark's instructions to go ahead and get this wire were, in fact, the instruction of the Chief Signal Officer of the Army, and also that the date of the orders resulting from this meeting had no relation to the date of the meeting, as allocations were made by Mr. Clark as rapidly as manufacturers could absorb the production.

7. It may here be said that Maj. R. A. Klock, who was at the time executive officer of the procurement and supply divisions of the

Signal Corps, as such, signed official papers by authority of the Chief Signal Officer of the Army, and all procurement transactions were under his personal supervision and subject to his approval. In a sworn statement, dated August 20, 1919, he states that under the transactions arising in this case Le Roy Clark was acting in behalf of the War Department.

8. On or about October 23, 1918, the claimant received the following telegram signed by Le Roy Clark, Chief of the Wire and Cable Section:

"Until production of outpost wire reaches maximum, it is necessary to supply twisted pair, 14, hard-drawn copper, 100 Megohm test. Start production immediately and let me know how much to send you order for. This is result of most urgent cable from Pershing, and nothing must be allowed to interfere. Advise what you consider the proper price and approximate weekly deliveries."

This telegram was confirmed on November 1, 1918, in a letter directed to the claimant by LeRoy Clark, chief, Wire and Cable Section, War Industries Board, which also stated that it had been recommended by the Chief Signal Officer that an order be placed with the claimant for 250 miles of No. 14, hard-drawn, outpost, distributing wire, and that the wire should apply on Signal Corps order No. 180,424; the letter also gave specifications of the wire and asked for acknowledgment of the receipt of the instructions and requested that the claimant use every endeavor to get the wire out promptly. This letter was followed by a purchase order marked "Order No. 180,424 SC," from the Signal Corps, dated November 9, 1918, issued "in accordance with recommendations of War Industries Board, Wire and Cable Section, of October 31, 1918," covering the following items:

250 miles wire, copper, hard drawn, tested distributing, twisted pair	
No. 14 B. & S. gauge, 100 megohms test, per mile. \$147.75-----	\$36,937.50
1 per cent 10 days from date of receipt of voucher in office of Dis-	
bursing Officer, Signal Corps-----	369.38
Net total-----	36,568.12

9. The claimant, prior to November 12, 1918, acquired at an actual cost to the claimant of 27½ cents per pound, a sufficient amount of copper for the production of 250 miles of wire, covered by said order, and on or about October 23, 1918, the date of the receipt of the above-mentioned telegram, allocated same to the manufacture of the wire, covered by said telegram and said Signal Corps order.

10. No formal contract was ever executed, owing to the signing of the armistice on November 11, 1918, and on December 11, 1918, the above order was suspended by telegram. The claimant, however, prior to receiving the telegram suspending production, had actually manufactured under said order 37.1 miles of wire which was valued

under the order at \$5,481.53. This 37.1 miles was delivered to and accepted by the Signal Corps and the claimant was paid therefor the last-mentioned sum, less 10 per cent. The claimant now asks for the payment to it of the sum of \$1,721.28, which sum is ascertained as follows:

26.688 lbs. of No. 14, hard-drawn, tinned copper, acquired at a cost of	
27½¢ per pound, and allocated to above order, left on claimant's	
hands after the manufacture of said 37.1 miles of wire-----	\$7, 889. 20
Said amount of copper to be retained by claimant at 21¼¢ per pound--	6, 167. 92

The difference between the original cost and salvage price---- 1, 721. 28

DECISION.

1. The evidence in this case discloses that the order upon which the claim is based was given not by the War Industries Board, an agency of the President of the United States, but by a duly constituted representative of the Signal Corps of the Army, acting by direct and express instructions of Maj. Gen. G. O. Squier, the Chief Signal Officer, and consequently given by an agent acting under authority, direction, or instruction of the Secretary of War.

2. The telegraphic instructions of this agent to the claimant, confirmed later by letter and by formal order of the Signal Corps, were accepted by the claimant as evidenced by its procurement and setting apart and holding exclusively for the filling of this order, prior to November 12, 1918, the requisite amount of copper to fill the same at a cost to claimant of 27½ cents per pound, and in its actually manufacturing more than 37 miles of wire therefrom in part performance of the order. Thus arose an agreement between the claimant and the United States within the so-called Dent Act, not executed in the manner prescribed by law, but which has been partly performed and is now suspended pending adjustment thereof.

3. Under said agreement, the claimant has incurred expenditures in performing or preparing to perform the same for which it is entitled to reasonable remuneration.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, revised, Purchase, Storage, and Traffic Division, General Staff.

Col. Delafield, Mr. McCandless, and Mr. Bayne concurring.

Case No. 1661.¹

***Rehearing In re CLAIM OF CHAMBER OF COMMERCE OF MONTGOMERY,
ALA.***

This case was remanded by the Secretary of War for further explicit finding of fact and decision as to the liability of claimant to the Central of Georgia Railroad as supplemental to a decision rendered by this Board in this case on August 18, 1919. This supplemental opinion merely makes more explicit one of the original findings of fact regarding location of trackage and confirms the original decision in every respect.

Lieut. Col. Williams writing the opinion of the Board.

FINDINGS OF FACT.

This case was remanded to this Board by direction of the Secretary of War for further explicit finding of fact and decision as to the liability of the Chamber of Commerce of Montgomery, Ala., to the Central of Georgia Railroad under an agreement of December 12, 1917, as supplemental to a decision heretofore rendered by this Board in this case on the 18th day of August, 1919.

On the 12th day of December, 1917, the Chamber of Commerce, Montgomery, Ala., entered into an agreement with the Central of Georgia Railroad in which it was provided:

"* * * that the railway company will proceed with all practicable dispatch to furnish the materials for and to construct the spur track required by the United States Government for an aviation field at and near Pike Road, Alabama, and that the Chamber of Commerce will, on the presentation of proper bills, promptly reimburse the railway company for the cost of such portion of this track as shall be located *on property other than the right of way or land of the railway company.*"

This Board finds, upon further evidence adduced by affidavits filed herein, that the 4,201 feet of trackage laid down by the Central of Georgia Railroad, on the land between its main line right of way and Taylor Field, and the 3,061.6 feet of spur track laid down on Taylor Field, was constructed by the railroad company upon property which it did not own and over which it had no right of way under and in pursuance of the contract of December 12, 1919.

¹ The original decision in the claim of Chamber of Commerce of Montgomery, Ala., will be found in Vol. I, these decisions, page 558.

DECISION.

From the above facts, and for reasons stated in the opinion heretofore rendered in this case, it is clear that the Chamber of Commerce of Montgomery, Ala., was under contractual obligation, under the terms of the agreement of December 12, 1917, to pay the Central of Georgia Railroad for material and cost of construction of the 4,021 feet laid down upon the land intervening between the railroad right of way and Taylor Field and the 3,061.6 feet of spur track laid down on Taylor Field, and that, the said trackage having been constructed by the direction and for the sole benefit of the United States, the United States is liable to the Chamber of Commerce of Montgomery, Ala., for the reasonable cost of the construction of said trackage.

DISPOSITION.

A copy if this supplemental finding of fact and decision will be forwarded to the Secretary of War.

Col. Delafield, Lieut. Col. McKeeby. and Mr. Wise concurring.

Case No. 1661.

In re **CLAIM OF THE CHAMBER OF COMMERCE, MONTGOMERY, ALA.**

1. **ADJUSTMENT—PRIMARY AND SECONDARY LIABILITY.**—Where in relation to construction of railroad trackage to and on an aviation training camp, the Government is under direct or primary obligation to the claimant for cost of construction of part thereof and is under indirect or secondary obligation to the railroad for cost of the whole trackage, this Board recommends to the Claims Board, Air Service, that the entire matter be adjusted by means of a tripartite agreement between the Government, the claimant, and the railroad. For facts and decision in this case see the opinion of the Board, August 18, 1919.

Lieut. Col. Williams writing the opinion of the Board.

1. In this case decision has heretofore been rendered by this Board to the following effect:

(a) That the Government of the United States is under direct obligation to reimburse the chamber of commerce, Montgomery, Ala., the reasonable costs of materials and construction of—

1. 4,021 feet of railroad trackage laid down upon the land intervening between the right of way of the Central of Georgia Railroad Co. and the said Taylor Field, and
2. 3,061.6 feet of spur track laid down on and over said Taylor Field,

which direct obligation of the Government of the United States to the said chamber of commerce arose from the fact that the said trackage was constructed by the said chamber of commerce under an agreement with the Central of Georgia Railroad Co. holding the said chamber of commerce liable for its cost of construction, and that the said trackage was built, and was taken over and used by and for the sole benefit of, the United States;

(b) That the chamber of commerce, Montgomery, Ala., by virtue of a provision in the lease between the said chamber of commerce and the Government of the United States, of November 28, 1917, is indebted to the United States for the reasonable cost of materials and construction of the siding 1,423.4 feet in length constructed upon said Taylor Field and adjacent to the spur track thereon; and

(c) That the Government of the United States, by virtue of a telegram from "Squier by Edgar" to the president of the Central of Georgia Railroad Co. of December 12, 1917, became, and is, secondarily liable to the Central of Georgia Railroad Co. for the

reasonable cost of the materials and construction of all of the said trackage above mentioned.

2. It is obvious, however, from the above decision that while there is a direct obligation on the part of the United States arising from the implied agreement to reimburse the chamber of commerce for the construction of the trackage mentioned in subsections 1 and 2, clause (a), paragraph 1 hereof, which was built for, and was accepted by and used for the sole benefit of, the United States, there did not arise, with respect to that trackage, any liability whatever of the Government of the United States toward the Central of Georgia Railroad Co., because said trackage was constructed by the said chamber of commerce, and the liability of the Government in this respect is not to the railroad company but to the chamber of commerce; and, in the absence of any other controlling considerations, payment by the Government to the chamber of commerce for the reasonable cost of the materials and the construction of this trackage would discharge all such liability upon the part of the Government of the United States for the construction of this trackage.

3. But the Government, in addition to being primarily liable to the chamber of commerce for the cost of the construction of the trackage mentioned in subsections 1 and 2, clause (a), paragraph 1, hereof, is also secondarily liable to the Central of Georgia Railroad Co., as a guarantor not only for the reasonable cost of the construction of the said trackage for which the Government is primarily liable to the chamber of commerce, but is also secondarily liable to the Central of Georgia Railroad Co. for the construction of the 1,423.4 feet of siding.

4. So that while payment by the Government to the chamber of commerce of the reasonable cost of materials and construction of the trackage for which the Government of the United States is primarily liable to the chamber of commerce, would relieve the Government so far as there may be any liability to the chamber of commerce, yet if the chamber of commerce did not pay the railroad company for the reasonable cost of material and construction of this trackage, the Government of the United States would still be secondarily liable for the reasonable costs of materials and construction of this trackage as well as the 1,423.4 feet of siding.

5. For the above reasons this Board feels justified in recommending to the Claims Board, Air Service, that this entire matter, involving not only the liability of the Government to the chamber of commerce and the liability of the chamber of commerce to the Government of the United States, but also the liability of the chamber of commerce to the Central of Georgia Railroad Co. under the terms

of the agreement between the chamber of commerce and the said railroad company of December 12, 1917, be made the subject of a tripartite agreement negotiated between and submitted for signature and execution by the Government of the United States on the one hand and the chamber of commerce, Montgomery, Ala., and the Central of Georgia Railroad Co. on the other, settling and disposing of all matters in controversy involved in this case.

6. This Board will therefore transmit to the Claims Board, Air Service, a copy of this memorandum together with certificate form C and an accompanying document setting forth the nature, terms, and conditions of the agreement, for appropriate action in accordance with clause C, paragraph 5, of Supply Circular 17, revised March 26, 1919, and in line with the recommendations contained in this memorandum.

Col. Delafield, Lieut. Col. McKeeby, and Mr. Smith concurring.

Case No. 478.

In re CLAIM OF WINFIELD WEBSTER & CO.

1. **REQUISITION BY FOOD ADMINISTRATION.**—Where a packer is ordered by the Food Administration, acting as agent of the War Department, to set aside a certain proportion of canned tomatoes to meet the needs of the Army, and prices are thereafter fixed by the Federal Trade Commission and adopted by the War Department, there is an agreement within the terms of the act of March 2, 1919, covering all the goods reserved in accordance with such order.
2. **SETTLEMENT OF INFORMAL CONTRACT PRIOR TO ACT OF MARCH 2, 1919.**—A settlement agreement of an informal contract prior to the act of March 2, 1919, was invalid because not based upon valid consideration. Such an attempted settlement must therefore be disregarded.
3. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for value of canned tomatoes held for the use of the Army. Held, claimant is entitled to relief under the act.

Mr. Howe writing the opinion of the Board.

STATEMENT OF FACTS.

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. It is a class B claim filed originally with this Board under Purchase, Storage, and Traffic Supply Circular No. 17, 1919.

2. The petitioner is a partnership composed of Winfield Webster and Guy L. Webster, his son, who are packers of canned fruits and vegetables at Vienna, Md.

During all the transactions involved in this claim, the claimants had no direct dealings with the Government, but were represented by the firm of Thomas Roberts & Co., of Philadelphia, who acted in the capacity of factors for the claimants. Roberts & Co. had handled the claimants' output for several seasons as respected its sale, and appear to have had authority to act for the claimants in matters involved in the disposition of a single season's pack.

3. During the season of 1918 the United States Government, through the Food Administration, issued a bulletin, "No. 10," by which it required all packers of tomatoes to place at the disposal of the Government 33½ per cent of the total 1918 pack of "Standard" grade tomatoes. This bulletin was followed about September 27, 1918, by a similar bulletin, "No. 12," which increased the percentage of this reservation to 45 per cent. Both these bulletins were delivered to Roberts & Co.

4. Before the issuance of bulletin No. 12 it had been understood in the trade that the Government was going to buy only sizes No. 3 and No. 10 (which figures referred to the size of the can), but that subsequently packers were notified that the Government would buy sizes Nos. 2, 3, and 10.

5. It appears that the claimants proceeded in good faith to comply with the terms of these bulletins, ceased selling their product to the public and cancelled sufficient future sales to enable them to reserve for the Government the required 45 per cent of their pack. It appears also that the claimants made certain deliveries of Nos. 3 and 10 to the Government but that no No. 2's were delivered.

6. The prices to be paid to claimants under the bulletins for their product by the Government were as follows:

For No 2 tomatoes.....	\$1.45 per dozen cans.
For No 3 tomatoes.....	2.30 per dozen cans.
For No. 10 tomatoes.....	6.80 per dozen cans.

These prices were fixed by the Federal Trade Commission. They were based on an estimate of cost plus a profit of 15 cents per dozen cans, and were accepted by the claimants.

7. Shortly after the armistice the canning trade was notified by the Government that it would require no more tomatoes and that packers were unconditionally released from the requirements of bulletin No. 12. This notice was brought to the attention of Roberts & Co. Most of the packers accepted this release, but others, including Roberts & Co., refused to accept it on the ground that they had contracts with the Government which the Government was bound to carry out. The Government thereupon issued a circular to the trade setting forth a proposed basis for settlement of all outstanding contracts for tomatoes. This was brought to the notice of Roberts & Co., who declined to negotiate on this basis on the ground that the prices proposed as a basis of settlement in the circular did not form a sufficiently definite basis of settlement. Still later the Government, apparently finding itself unable to settle with packers on this basis, instructed all zone offices to notify the trade that the Government would settle for all the undelivered balance of the 45 per cent of the 1918 pack at substantially the difference between the prices originally fixed by the Federal Trade Commission and the then market prices. These instructions were embodied in a circular issued by Gen. R. E. Wood, Director of Purchase and Storage, to the zone officers on December 13, 1918. Some few days intervened before proper orders for carrying out this direction could be issued by the various zone supply offices. In the meantime, during the last week of December, 1918, Thomas Roberts & Co. submitted to the zone supply officer in New York a proposal for settling the claims of Winfield Webster & Co. on account of the undelivered balance of

their pack. This proposal contemplated the payment by the Government of a certain amount of cash and the retention by the claimants of the balance of tomatoes they had on hand at the time of settlement. This proposal is submitted as Exhibit J to claimants' petition, as follows:

"EXHIBIT J."

Winfield Webster & Co.'s tomatoes for Government. Dec. 30th, 1918.

	Cases.	
Had order for 15,000 #3's: Del'd.....	9,150	
Still to deliver.....	5,850	
Will cancel these at 10¢ per dozen.....		\$1,170.00
Had order for 8,000 #10's: Del'd.....	6,170	
Still to deliver.....	1,830	
Will cancel these at 10¢ per case.....		183.00
Want order for 22,000 cases #2's tomatoes		
Will cancel these at 15¢ per case.....		3,300.00
		<hr/>
Making a total settlement.....		4,653.00

A case contains two dozens.

This proposal was accepted by the New York Zone Supply Office under authority from Washington on December 30, 1918, and was embodied in a settlement agreement prepared by the New York Zone Supply Office and Roberts & Co., but never in fact executed. It appears that the claimants knew that Roberts & Co. had made this proposal and its terms. They do not deny that they ratified and approved this proposed settlement, so that there is no question involved of Roberts & Co.'s authority to make the settlement.

Claimants' contention, however, is as follows:

That Roberts & Co.'s proposal was based on an estimate of the quantity of tomatoes which the claimants had left on hand. That this estimate was arrived at at a meeting at claimants' factory at which were present two Government inspectors, a representative of Roberts & Co. and claimants' shipping clerk. That these four men together made an estimate of the quantity of tomatoes on hand and was the basis of Roberts & Co.'s offer of settlement; that this estimate was incorrect because the computation was wrongly made, and the estimate overstated the amount of tomatoes which the claimants actually had on hand. The estimated amounts of tomatoes were as follows:

	Cases.
No. 2's.....	22,000
No. 3's.....	5,850
No. 10's.....	1,830

The amounts which claimants state they subsequently found were actually on hand at the time of Roberts & Co.'s offer of settlement were as follows:

	Cases.
No. 2's.....	16,417
No. 3's.....	2,262
No. 10's.....	645

This shows a difference of 10,356 cases altogether. Claimants' contention is that in view of this mistake in computation Roberts & Co.'s offer was made under a mistake of fact, that claimants approved it under a mistake of fact and that it was accepted by the Government under a mistake of fact and for this reason the settlement agreement was made under a mutual mistake of fact. That it should, therefore, not be considered binding on claimants, but should be set aside and claimants' damages computed and assessed on a different basis, namely, the actual loss which claimants claim to have suffered as a result of obedience to the Government's directions. This loss claimants allege to be the difference between the prices that the Government would have paid under Gen. Wood's offer and the prices which claimants finally realized on the balance of tomatoes left on their hands, taken either at actual sales prices or at market value when not sold. These differences are stated as follows: (Exhibit L to petition.)

On No. 2's-----	\$7, 920. 08
On No. 3's-----	5, 297. 08
On No. 10's-----	661. 18

or a total difference of \$13,878.29, together with certain items for storage and interest, less certain credits for commissions, etc., bringing up the total claim to \$15,537.93.

The reasons given by claimants to explain why the mistake in ascertaining the amount of the balance of tomatoes on hand was made are as follows:

Claimants do not deny that their shipping clerk was authorized to make the computation on claimants' behalf, but they say at the time it was made and for sometime previous there was very serious illness in claimant's family, both Mr. Guy Webster, himself, and his wife having been ill with influenza and the wife of Mr. Winfield Webster, and mother of Guy Webster, having been stricken with a serious ailment of which she soon after died. That as a result of these unfortunate and unexpected circumstances, Mr. Guy Webster who had charge of sales for the firm and would normally have attended to the computation was unable to give his customary and proper attention to the business, and his father, Mr. Winfield Webster, was equally unable to undertake the supervision of the sales department with which ordinarily he had nothing to do. The result was that the burden fell on the shipping clerk who was compelled to assume unaccustomed duties and to do alone what he could to keep the business going, and in consequence of this, the accounting and stock taking system fell into arrears and the business operations generally were greatly upset and retarded and accurate methods became impossible. That when the computation made by this clerk was brought to the

attention of claimants, they consented to it in real ignorance of the mistake of fact involved, which ignorance was caused by the abnormal state of affairs in their family and their factory, resulting in error which under normal conditions would not have occurred.

Claimants allege that they did not discover the mistake until February 1, 1919, because owing to the foregoing state of affairs they were not able to get up to date with their accounting and take an accurate account of stock until that time. It does not appear that claimants were guilty of any laches after discovering the mistake.

8. At the date when this settlement agreement was reached by Roberts & Co. and the Government, the prices of "Standard" tomatoes in the Philadelphia market, which was the market available to the claimants through their factors and which it appears in fact was also the best market obtainable, were approximately as follows:

	Per dozen.
For No. 2's-----	\$1. 20
No. 3's-----	1. 80
No. 10's-----	6. 50

With unimportant fluctuations these continued to be the market prices up to the latter part of January, 1919, when claimants testify they first discovered the mistake in the quantity of tomatoes which they had on hand at the time of the settlement.

Claimants' actual sales of the tomatoes on hand were made between January 14 and April 1, 1919, at approximately the following prices:

	Per dozen.
For No. 2's-----	\$1.03
No. 3's-----	1. 13
No 10's-----	4. 75

It thus appears that under the settlement agreement in order to make claimants whole it would have been necessary for them to sell the tomatoes promptly; that they were left with tomatoes on their hands on a falling market, and that by the time they realized on their tomatoes, the fall in the market prices had been such as to make it impossible for them to recoup themselves on the basis of the settlement agreement.

DECISION.

1. An analysis of the evidence produced at the hearing of this claim leads to the conclusion that the supplemental agreement which claimants asked to have set aside should not be considered as binding on claimants. The original agreement, arising out of the bulletins of the Food Administration, was an informal agreement under which the contractor had no rights enforceable against the United States. The settlement agreement was not valid because it was not based on any valid consideration. It could not, therefore, be an effective settlement of the original informal agreement.

2. The attempted settlement agreement should, therefore, be disregarded, as not binding on either claimants or the Government, and the original agreement should be regarded as merely suspended, and as still the basis of any adjustment arrived at.

3. The basis of this original agreement is the Canned Foods Bulletin No. 12 of the United States Food Administration, Division of Coordination of Purchase, dated September 27, 1918, which was issued to the canning industry and served on Roberts & Co. as the authorized representatives of claimants. This bulletin contains the statement that the requirements of the Army, Navy, and Marine Corps are placed at 45 per cent of the total 1918 pack and contains the following words:

“The Army, Navy, and Marine Corps guarantee to take, and you are hereby directed to hold, the above percentage of your pack.”

It appears from the evidence in this case that in issuing these directions of the claimants, the Food Administration acted as the agent of the War Department as respects the total amount of tomatoes involved in this claim. This appears from the language of the bulletin itself, and is confirmed by the action of the War Department which followed with relation to these claimants.

The New York Zone Supply Office was originally notified by the Director of Purchase and Storage that Roberts & Co. were agents for claimants and that all transactions covering their quota of tomatoes for the Army were to be handled by Roberts & Co. The notification given to packers and Roberts & Co. on claimants' behalf that the Army would require no more tomatoes and that packers were released from the requirements of Bulletin No. 12 was issued by the New York zone supply officer under orders from the Director of Purchase and Storage, War Department, and the offer to settle with packers for all the undelivered balance of the 45 per cent of the 1918 pack, contained in the circular issued by Gen. Wood on December 13, 1918, was issued as an official communication of the director of purchase and storage, and contemplated a settlement for the entire quota of tomatoes reserved by claimants and involved in this case. The attempted settlement initiated by Roberts & Co. related to all of claimants' tomatoes and its acceptance by the New York Supply Office under instructions from Washington is further confirmation of the agreement originally reached with claimants by the United States Food Administration and that it was intended to cover the whole 45 per cent of claimants' pack.

The authority of the Food Administration to make an agreement on behalf of the War Department with claimants covering all of the tomatoes involved in this claim and the fact that such an agreement was made would, therefore, appear to be clearly established.

The prices to be paid to claimant under this agreement were established by the Federal Trade Commission. Although it does not appear clearly what relation the Trade Commission bore to the War Department in connection with the establishment of these prices, it is clear from the evidence in the case that the prices when established were accepted and adopted by the War Department as a part of its agreement with claimants.

4. Claimants take the position that in arriving at an adjustment of this informal agreement, under the act of March 2, they should be permitted to accept at this date Gen. Wood's offer of settlement of December 13, 1918, and that their compensation should be assessed on this basis. We do not think that this is the proper method of adjustment. Claimants had ample opportunity to avail themselves of Gen. Wood's offer. This apparently they preferred not to do, but rather to rely on the counteroffer made to the Government by their agents who ignored the offer of Gen. Wood, which offer accordingly, claimants can not accept now.

5. Claimants did, however, have an informal agreement with the War Department suspended before it was fully performed and which can properly be adjusted under the act of March 2, 1919.

DISPOSITION.

1. Accordingly, this Board will make and transmit a statement of the nature, terms and conditions of the agreement and certificate "C" to the Claims Board, Director of Purchase, for action in the manner provided in Supply Circular No. 17, Purchase, Storage and Traffic Division.

Lieut. Col. Williams, Mr. Hamilton and Mr. Wise concurring.

Cases Nos. 60, 61, 62, 63, and 64.

Rehearing in re CLAIM OF THE TORREY-EPSTEIN CO.

1. **BONUS CLAUSE—WHAT CONSTITUTES COMPLIANCE WITH.**—In case No. 60 there was a bonus clause similar to the one in the case of Wanamaker & Brown, case No. 2133; for the construction of the bonus clause, see that case.
2. **CLAIM AND DECISION.**—Case No. 60 (contract No. 349-B) was a class A claim founded upon a bonus clause incorporated in that contract. Cases Nos. 60 (contract No. 1138-B), 61, 62, and 63 (contracts Nos. 5464-B, 2228-B, and 6964-B) are class B claims and are for bonus alleged to be due under contracts in which there was no bonus clause. case No. 64 is a class B claim and is for facilities under contracts Nos. 349-B, 1138-B, 5464-B, 2228-B, 6964-B, 642, and 903. Held: Claimant was denied relief for facilities under all the contracts, and for bonus, except under contract No. 349-B, thus affirming the decision of the board of August 19, 1919, which was based on the Heidelberg, Wolff case, No. 30, except as to bonus claimed under contract No. 349-B. The decision in the case of Heidelberg, Wolff & Co., having been modified by the decision of the Board on a petition for rehearing (Memorandum decision of Chairman Delafield, Vol. I, pt. 2, p. 319) to the extent appearing in the decision in the case of Wanamaker & Brown (case No. 2133) the Board decided that its original decision of August 19, 1919, under contract No. 349-B, case No. 60, be modified in such manner as to make it consistent with the decision in the case of Wanamaker & Brown and the decision of Wanamaker & Brown substituted for so much of the decision of August 19, 1919, as passes upon the effect of said bonus clause.

Mr. Hunt writing the opinion of the Board.

UPON REHEARING.

ORIGIN AND NATURE OF CLAIM.

On August 19, 1919, this Board, as appears by its decision of the said date, denied the claims of the above-named claimant. Thereafter the said claimant filed its petition for rehearing, supported by certain affidavits.

On November 24, 1919, the standing committee on rehearings denied the petition for rehearing, except in so far as the said petition asked for redetermination of the rights of the petitioner arising under contract No. 349-B, which contained the so-called "bonus

clause," which clause was the subject of the decision of this Board in the case of Wanamaker & Brown, No. 150-C-2133.

The said decision of August 19, 1919, held that, upon the authority of the decision in the case of Heidelberg, Wolff & Co., No. 30, the said bonus clause was without consideration and that therefore there was no obligation of the United States thereunder. The decision in the case of Heidelberg, Wolff & Co. having been modified to the extent appearing in the decision in the case of Wanamaker & Brown, No. 2133, it is necessary that the decision of August 19, 1919, in the Torrey-Epstein matter be modified in such manner as to make it consistent with the said decision in the case of Wanamaker & Brown.

FINDINGS OF FACTS.

It appears by paragraph three of the said decision of August 19, 1919, that the claimant was paid the so-called "bonus" under contracts Nos. 642 and 903, and that the claimant made claim for the said bonus under contracts Nos. 349-B, 1138-B, 2228-B, 5464-B, and 6964-B.

It further appears from the said decision that the bonus clause was incorporated in contract No. 349-B. It appears that the said bonus clause was not a part of contract No. 1138-B, and it does not appear that the said bonus clause was incorporated in Nos. 2228-B, 5464-B, or 6964-B. nor is there any evidence before this Board to support the claim of the Torrey-Epstein Co. for any bonus under the said last-stated contracts.

It appears further, by the fourth paragraph of the decision of August 19, 1919, that the Torrey-Epstein Co. has received certain payments from the Government as bonus under contracts 642 and 903, but upon what principle it does not appear.

It further appears that contract No. 349-B was not executed in the manner prescribed by law. It does not appear whether or not contracts Nos. 642 and 903, in which also the bonus clause was incorporated, were executed in the manner prescribed by law or otherwise.

DECISION.

The decision of this Board of August 19, 1919, is hereby modified to such effect as to set aside the said decision in so far as it passes upon the rights and obligations of the parties with reference to the effect of the so-called "bonus clause" in clothing contracts.

It is the decision of this Board that its decision in the case of Wanamaker & Brown, No. 2133, be substituted for so much of the decision of August 19, 1919, as passes upon the effect of the said bonus clause.

DISPOSITION.

This case is transmitted to the Claims Board, Office of the Director of Purchase, for proceedings pursuant to the said decision of October 28, 1919, in the case of Wanamaker & Brown, No. 2133, for the execution of certificate C, and for further proceedings pursuant to Supply Circular No. 17.

It is suggested that the Claims Board, Office of the Director of Purchase, also ascertain under what rule compensation was given to the Torrey-Epstein Co. under contracts Nos. 642 and 903, and if it be found that such compensation was paid on a principle inconsistent with the decision of this Board in the case of Wanamaker & Brown, No. 2133, that the proceedings under said contracts be examined and redetermined with a view to accomplishing settlements under all contracts with the Torrey-Epstein Co. containing the said bonus clause in a manner consistent with the decision of this Board in the said case of Wanamaker & Brown, No. 2133.

Col. Delafield, Mr. Eaton, and Mr. Bryant concurring.

CASE No. 2233.

In re CLAIM OF CHICAGO COLD STORAGE WAREHOUSE CO.

1. **NEGOTIATIONS MERGED IN WRITTEN CONTRACT—CLAIM FOR FACILITIES.**—Where parties enter into a written contract, if the contract purports to embody therein all of the subject matter of the negotiations, all previous negotiations are merged in the contract and the writing is held to be the final understanding of the parties; and where claimant entered into a written contract with the Government to store in claimant's warehouse certain quantities of meat, at prices fixed by the contract, the Government is not liable to pay claimant for expenditures made by it in increasing its facilities sufficiently to perform the contract, nor to pay for storage space which was vacant while claimant was making changes in its warehouse, the contract not providing for such payment.
2. **AMENDMENT—DISTINCT CLAIM—TIME OF FILING.**—An amendment to a claim, if intended to vary, amplify, or to remedy omissions or defects made in stating the original claim, may be allowed, and when allowed it relates back to the date of presenting or filing the original claim; but if under the guise of an amendment, a distinct claim, arising out of a different contract, is preferred, and such amended claim is first presented subsequent to June 30, 1919, it does not come within the relief given by act of March 2, 1919, and can not be entertained by this Board.
3. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, based upon a parol contract alleged to have been made between claimant and the assistant depot quartermaster, Chicago, Ill. The original claim as presented and as set forth in claimant's petition, is for the cost of making changes in claimant's cold storage warehouse and increasing the facilities of claimant and for loss of rent for vacant space in the warehouse.
Another claim was presented by way of amendment to the original claim, and was first filed at the hearing of December 13, 1919, and is based upon a contract alleged to have been executed subsequent to the one set forth in the original claim. Held, Claimant is not entitled to relief upon original claim. Held further, Amendment relates to matters distinct from those set forth in original claim and the claim thereunder is barred under act of March 2, 1919, and can not be entertained by this Board.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$130,142.67 by reason

of an agreement alleged to have been entered into between the claimant and the United States. At the hearing the claimant filed, as an amendment to its claim, a supplemental claim for \$8,415.27.

2. The original claim is for \$130,142.67. Of this amount, \$80,142.67 is for insulating material, refrigerating machinery, piping, coils, etc., alleged to have been placed in the claimant's refrigerating warehouse at the request of the Government; the balance of \$50,000 is for loss of rental of cooling chambers in the warehouse while such changes were being made.

3. The supplemental claim of \$8,415.27 is for loss of rental of cooling space in the warehouse alleged to have been held for the British Ministry for the storage of beef at the request of the United States, but not used by the British Ministry.

4. The claimant conducted three large plants for the storing and freezing of meats in Chicago. The cooling chambers in these plants were about 60 per cent of the total area, and the freezing chambers about 40 per cent. The freezing chambers were kept at a lower temperature than the cooling chambers. The refrigerating chambers require a greater amount of refrigerating machinery and equipment.

5. In February, 1918, Maj. (then Capt.) O. F. Skiles, Q. M. C., assistant depot quartermaster, Chicago, informed Mr. M. C. Cummings, vice president and general manager of the claimant company, that it was necessary for the Government to have all the cold storage space for beef that could be obtained in Chicago, and unless the meat storage plants voluntarily gave up their space, the Government would have to use the necessary means to obtain them. Various conversations were had on this subject, which will be referred to later. On March 6, 1918, the claimant wrote to Maj. Skiles as follows:

"We propose to set aside and reserve for the use of your department of the Government, sufficient space in our three plants to accommodate the storage of not to exceed ten million pounds of beef quarters, for the period from April 1st, 1918, until peace is declared between the United States and Germany, but not to exceed five years, i. e. (April 1st, 1923).

"Our charge for the reserving of this space for you will be \$12,500.00 each calendar month. This charge includes the receiving and storing ten million pounds once during each calendar month. Additional receipts in excess of ten million pounds in any calendar month shall be charged at the rate of 1/8th of a cent per pound.

"Goods in storage in the said space at the beginning of any calendar month will be treated as received that month."

On March 13, Maj. Skiles replied, accepting the proposal, but stating:

"3. It will be impracticable to enter into a contract for this space for any given period of time, but it is understood that this space will be available for use by the depot quartermaster, Chicago, Ill., for

such period of time, not exceeding five years from April 1st, 1918, as may be necessary, 30 days notice to be given prior to evacuation. It is understood that the above charges include the freezing and handling."

6. On March 13, 1918, a formal written agreement, signed at the end by the parties, was entered into between the Government and the claimant, effective as of April 1, 1918, and expiring June 30, 1918, whereby the claimant agreed to furnish the Government space in its three plants for the freezing and cold storage of 10,000,000 pounds of fresh beef, to be tempered to the satisfaction of the contracting officer, and also agreed to furnish all the necessary labor and other facilities for loading and storage on meats, at the agreed price of \$12,500 a month. Provision was also made for the payment of one-eighth of 1 cent per month for beef stored in excess of 10,000,000 pounds. This contract also contained the following provision:

"10. That, at the option of the United States, this contract, with all its covenants and agreements, may be renewed yearly as often as the needs of the public service may require, so as to give the United States continuous service, not extending, however, beyond the thirtieth day of June, 1923. But no renewal shall be made to include more than one fiscal year; and the United States reserves the right to terminate this contract at any time within the period for which the same is made or may be renewed by giving thirty days' notice in writing to the contractor or agent."

7. The testimony is vague whether a new written agreement was immediately entered into about June 30, 1918, after the expiration of the contract just referred to, or whether the parties to that contract merely continued on the basis of the relations thereby created until October 1, 1918. No contract or agreement was offered in evidence, but the Government has paid for the space it used during this period. The question of the basis of the contractual relations then existing during that period is, therefore, immaterial.

On October 1, 1918, the claimant and the Government entered into another formal contract effective June 30, 1919. The provisions of this contract are similar to those of the contract of March 13, 1918, excepting that the space to be provided was to be sufficient for freezing and holding 20,000,000 pounds of beef instead of 10,000,000, and there was a different basis of calculation of payment. Article 10 in this contract is identical in verbiage with article 10 of the contract of March 13, 1918.

This contract was cancelled as of March 31, 1919, by letter of February 25, 1919, which stated:

"The above cancellation is in accordance with authority exercisable by the government, as outlined in paragraph no. 10 of the contract."

8. On May 6 a new contract was entered into, effective as of April 1, 1919, which expired June 30, 1919. The principal difference between this agreement and its predecessor was that no definite amount of space was to be provided or agreed to be used, but the Government was to pay for storage according to a schedule of prices set forth in the agreement. Article 10 in this contract is identical in verbiage with article 10 in the preceding contracts, excepting only that the Government might not extend its option of renewal beyond June 30, 1921, under the last contract, whereas June 30, 1923, was specified in the two preceding contracts.

9. The Government was still storing meat at the claimant's warehouse and promptly paying the charges for so doing under a contract dated July 1, 1919, which expires June 30, 1920. This contract contains similar provisions to the contract dated May 6, 1919, and under it the Government may not extend its option to continue the lease beyond June 30, 1921.

10. Mr. Cummings, the vice president and general manager of claimant company, testified that the Government had, during the life of the contracts herein referred to, fully discharged its obligations to the claimant under said contracts, and neither the original nor the supplemental claim is for breach of the contractual relations established by such contracts.

11. At the hearing the claimant introduced testimony by which it sought to show that the written contracts or leases above referred to did not embody the prior verbal agreements made between claimant's representative and Maj. Skiles as representative of the Government. Though such evidence is legally incompetent to vary the terms of a written contract or agreement, it was permitted to be introduced so that claimant might show, if it could, that there was some other oral agreement, apart from the contracts, which was not intended by the parties to be embodied in the terms of such contracts. In this the claimant signally failed.

12. Mr. Cummings was the only witness for the claimant. His testimony, when reduced to narrative form, is in effect as follows:

During the month of February, 1918, several conversations were had between witness and Maj. Skiles relative to storage of Government meats. Maj. Skiles asked us to furnish as much space for storage of meats as we possibly could, stating that he would give us more meat for freezing than we could ever care for, no matter how much we enlarged our facilities. On account of what Maj. Skiles said, we prepared ourselves to handle a larger volume of beef and we explained to Maj. Skiles that in order to increase our capacity for freezing we would have to expend money for additional piping. Because of these solicitations we expended \$80,142.67 in equipping our

plant, so as to change part of the cold-storage space into freezing space, but were able to take care of as large an amount of meat as the Government tendered us. It was understood that the Government would lease the increased facilities for five years and all conversations prior to Maj. Skiles's letter of March 13, were "on the basis that (the space was to be leased) as long as the war lasted, not to exceed five years." Witness understood this to mean during the period of hostilities. Subsequently Maj. Skiles knew the changes were being made. Witness understood that the arrangement with the Government would continue for some time, that is, for as long as hostilities lasted, but not to exceed five years. It was also understood that a formal contract would be secured from the Government covering the agreement. The claimants did receive and enter into such a contract, viz, the contract effective April 1, 1918, and expiring June 30, 1918, but at the time of entering into this and subsequent written contracts, did not insist on provisions that would protect them and reimburse them for the outlay they made in altering their plant. The Government is still using space in their plant to the extent of 13,000,000 or 14,000,000 pounds of beef and 600,000 pounds of poultry.

13. On the other hand, the testimony of Maj. Skiles, when reduced to narrative form, is in effect as follows:

The result of the conversation was that I engaged sufficient space in his plant for freezing and storing 10,000,000 pounds of beef in one month at a rate that was later set forth in a formal contract. The case was thoroughly gone into in all its angles at prior verbal conferences and the written contract embodies the general terms of the verbal conferences. I requested Mr. Cummings to submit the terms agreed upon in writing. He did so by letter dated March 6, and accepted by me by letter dated March 13. A contract was prepared on the basis of this offer and acceptance, and we agreed on no terms outside of that contract, nor did I make any promise or representation contrary to the provisions of the formal contract. The question of changes in the plant was never discussed and never entered into the agreement at all, as I understood the claimants then had sufficient facilities to furnish me freezing and storage space for fresh beef. Later in 1918, I requested to be advised when claimants could furnish additional space and the contract of October 1, 1918, resulted. I had no idea what claimants had done to increase the capacity of their plant from 10,000,000 to 20,000,000 pound space, and did not request them to make such changes. I did not promise that they would receive a price for the rental of space furnished that would absorb or amortize the cost of increased facilities, and I did not promise to reimburse them for space that remained idle while changes were being made.

14. The supplemental claim of \$8,415.27 is for loss of rental of cooling space held by the claimant for the British Ministry during the month of September, 1918, but not used. When this supple-

mental claim was presented to this Board at the hearing on December 13, 1919, the Board permitted evidence to be introduced in support of the supplemental claim, reserving for future determination the question whether the supplemental claim was a proper amendment to the original claim, and the question of its jurisdiction over the supplemental claim.

15. It appears that claimant received a letter every month from the quartermaster's office, assigning a certain quantity of beef to be received during the month, and stating the quantity each different packer was to furnish. Thereupon, the claimant would communicate with the various packers and arrange for the arrival of the beef. This notice was in the nature of advance information, so that the freezer plants could make preparations to take care of the beef as it arrived. Maj. Skiles was requested by the British Ministry to assist in getting storage space for beef in Chicago, which was to be bought by the British from American packers f. o. b. New York. On September 3, 1918, Capt. Cook, of the office of the depot quartermaster, Chicago, wrote the claimant as follows:

"1. The British Ministry figures on purchasing for storage in addition to other reference in another letter for storage, 2,000,000 pounds of beef and they are figuring to place this in your storage house. Wish you would also direct the different packers to send whatever amounts are necessary of the total quantity of beef to be frozen, in each separate house, so that there will not be any additional switching.

"2. The same holds good in reference to team deliveries at your different houses. Please designate each house for both team and car deliveries."

On September 4 Capt. Cook wrote claimants as follows:

"1. You are advised that instructions have been issued to start shipment to you immediately of 17,240,000 pounds of beef for September, as follows:

Cudahy Packing Co., for U. S. Army	3,000,000
Agar & Company, for U. S. Army	1,500,000
Guggenheim Bros., for U. S. Army	1,000,000
Independent Pkg. Co., for U. S. Army	1,100,000
John Merrell & Co., for U. S. Army	1,000,000
Pfaelzer & Co., for U. S. Army	1,000,000
Ogden Packing Co., for U. S. Army	400,000
Chicago Packing Co., for U. S. Army	1,000,000
Enterprise Packing Co., for U. S. Army	40,000
Morris & Co., for British Ministry	3,500,000
Wilson & Company, for British Ministry	3,000,000
Cudahy Packing Co., for British Ministry	500,000

"2. You are instructed to see that cars are placed promptly and unloaded immediately. If it is necessary to carry over any cars, you are to see that they are kept well iced with 15 per cent salt."

16. The packers only furnished about one-half the beef expected for the British, with the result that the space in claimant's plant

reserved for the balance remained vacant. On September 18 the claimant notified the depot quartermaster that the space reserved for the British Ministry beef was not being fully used. During the month the claimant had been in daily communication with the three packers in reference to its failure to deliver the full amount of beef for which space was reserved for the British. The space which claimant reserved for the British was in addition to the space which claimant had reserved for the American Army under existing agreements.

DECISION.

1. The major portion of the original claim, which amounts to \$80,142, is for machinery, equipment, and facilities alleged to have been installed in claimant's cold-storage warehouses in pursuance to an alleged agreement with an agent of the Government. This Board will, therefore, consider the entire original claim as properly before it under the act of March 2, 1919, although the Board of Appraisers may properly have had jurisdiction of the lesser item of the original claim, amounting to \$50,000, because it is for the loss of rental of claimant's real estate during the period that a portion of the plant was idle while the improvements were being made.

2. In its last analysis, the original claim is based upon the contention that Maj. O. F. Skiles, Q. M. C., Assistant Depot Quartermaster, Chicago, requested Mr. Cummings, general manager and vice president of claimant company, to make the changes in its plant which entailed these expenditures, and agreed that the Government would pay for the same by leasing such space in the plant for a sufficient period of time while the war lasted, not exceeding five years, as would enable the claimant to obtain reimbursement for the outlay.

3. The testimony of Mr. Cummings is to the effect that Maj. Skiles requested all the space in claimant's plant which could be furnished; that he knew that claimant's plant did not have adequate freezing facilities; that it was necessary to make expenditures to change the cooling chambers in the plant into freezing chambers, and that Maj. Skiles requested that such changes be made, and was aware of the fact that they were made. This testimony is directly contradicted by the testimony of Maj. Skiles, who denied that he requested the changes to be made; asserted that he had no knowledge that they were made, and had no conversations whatever with the claimant's representative about such changes. Maj. Skiles further testified that the prior verbal conferences which occurred in February resulted in his requesting Mr. Cummings to submit an offer in writing. Mr. Cummings did submit such an offer by letter dated March 6, which was accepted by Maj. Skiles's letter of March 13, and that a

formal written contract was entered into on March 13 which embodied all of the terms agreed upon at the prior conferences.

4. The contract of March 13, 1918, which the claimant entered into with the Government, is signed at the end by the parties. By it the claimant agreed to furnish the Government space in its plant for the freezing and cold storage of 10,000,000 pounds of fresh beef, to be tempered to the satisfaction of the contracting officer, and also agreed to furnish all the necessary labor and other facilities for unloading beef from cars, placing in storage and reloading into cars when ordered out, at the agreed price of \$12,500 a month. Provision was also made for the payment of one-eighth of 1 cent per month for beef stored in excess of 10,000,000 pounds. The final provision (Par. 10) of said contract gives the Government the option to renew the said contract yearly as often as the needs of the public service may require, so as to give the United States continuous service, not extending, however, beyond the 30th day of June, 1923, but no renewal shall be made to include more than one fiscal year. The United States also reserves the right to terminate that contract at any time within the period for which the same is made or may be renewed by giving 30 days' notice in writing to the contractor or agent.

5. The relations established by this contract were continued after its date of expiration until October 1, 1918, when a similar contract was entered into which expired, by its terms, June 30, 1919. This second contract was cancelled and superseded by a third contract, effective June 30, 1919. All of these contracts contained similar termination clauses. The Government is still using part of claimant's plant for the storage of meats.

6. There is a direct conflict in the evidence relating to the negotiations which occurred during the month of February, 1918. But this conflict is not so material when we consider that all such negotiations were based upon Mr. Cummings's understanding that the Government should lease the added facilities "as long as the war lasted," which he understood to mean "during the period of hostilities." The Government has fully carried out this understanding of the bargain, and is still storing millions of pounds of meats in claimant's warehouse. We therefore conclude that the Government has fully performed any agreement which claimant assumed it may have had, and is therefore under no further liability to claimant.

7. The law presumes that when parties enter into a formal written contract, all prior agreements are embodied therein, unless fraud is shown. There is no suggestion of fraud in this case. Mr. Cummings testified that he did not insist on any provision being inserted in the formal contract to insure obtaining reimbursement for the

expenses of altering his plant. He signed the formal contract knowing it contained no such provision, and it is now too late for him to complain. In *Brawley v. United States*, 96 U. S. 168, the Supreme Court said:

"The written contract merged all previous negotiations and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement it was claimant's folly to have signed it."

The formal written contracts which claimant entered into by their terms totally negative the contention that the Government ever entered into any agreement other than to lease space in claimant's plant, with the option of renewal and with the privilege to terminate the lease on 30 days' notice. These contracts have been fully performed, and we must, therefore, hold that the written contracts fully embody the prior negotiations and agreements between the parties, and such contracts in no wise support the contention that there is liability under the act of March 2, 1919, to pay to claimant the amount of its original claim, or any part thereof.

8. The supplemental claim of \$8,415.27 is for loss of rental value of space in claimant's warehouse held for, but not used by, the British Ministry, at the request of Capt. Cook of the Office of the Depot Quartermaster, Chicago. This space was not a part of the space reserved for the American Government under its formal contracts, or the alleged agreement on which the original claim is based. It is totally separate and distinct from the original claim, and is in no wise germane to the original claim. It is based upon a letter written by Capt. Cook on September 4, 1918, whereas the alleged agreements on which the original claim is based occurred in February and March, 1918. While this Board should be liberal in allowing amendments to claims, it should not permit the filing of a separate and distinct claim, at this late date, which is not germane to the original claim or the agreement on which the original claim is based. The act of March 2, 1919, prescribes the time within which claims must be filed, and thus impliedly limits the power of this Board to receive and consider, under the guise of amendment, a separate and distinct claim based on a separate and distinct agreement from that which is relied upon to support the original agreement. Such is the nature of the supplemental claim presented to this Board at the hearing on December 13, 1919. We are, therefore, extremely doubtful of our jurisdiction over such supplemental claims.

9. Assuming, however, that this Board has jurisdiction of the supplemental claim, still it is clear that no agreement, express or implied, was made by any officer or agent acting under the authority, direction, or instruction of the Secretary of War. In his

letter of September 3, Capt. Cook informed the claimant that the British Ministry were figuring on purchasing 2,000,000 pounds of beef for storage, which they expected to place in claimant's warehouse. On September 4 claimant was notified by Capt. Cook that instructions had issued to packers to start shipment of 7,000,000 pounds of beef for the British Ministry. Clearly the claimant had notice that this beef was for the British Government, and any space reserved in the plant was to be reserved for the packers supplying the British Government. There arose out of these two letters of September 3 and 4 no express or implied promise on the part of the Government of the United States to pay for the space which claimant reserved for the British Ministry. It is, therefore, found that no contractual relations existed between claimant and the Government of the United States in the matters covered by the supplemental claim, and hence relief may not be given under the act of March 2, 1919.

10. For the reasons stated, the Board is of the opinion that the record fails to disclose any facts which entitle the claimant to relief under the act of March 2, 1919, and accordingly the relief sought is denied.

Col. Delafield, Mr. Eaton, and Mr. Harding concurring.

Case No. 1261.

In re **CLAIM OF WALTER SODERLING CO.**

- 1. CLAIM AND DECISION.**—This is a claim for the value of a rubber belt made and delivered on an oral order from an authorized agent of the Government, under the act of March 2, 1919. Held, that claimant is entitled to recover.

Mr. Patterson writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form A, was filed with the Air Service, Claims Board, for \$365.40, by which Board it was referred to the Board of Contract Adjustment July 1, 1919, for consideration as a class B claim, it not being entirely supported by written evidence; and it has been so treated.

There being no controversy as to the material facts, no hearing was considered necessary, and none was held.

FINDINGS OF FACT.

The Board finds the following to be the facts:

I.

In or about February, 1918, Capt. Edward D. Payne, Signal Corps, United States Army, was head of the Ordnance and Instrument Section, Science and Research Division, Signal Corps, United States Army.

Dr. J. A. E. Eyster was a civilian employed as consulting physiologist by the Bureau of Mines in relation to the Experimental Laboratory for Air Medical Research, established at the American University Experiment Station, which was later transferred to Mineola, N. Y., and was assigned for duty with the Science and Research Division of the Signal Corps, United States Army.

Experiments were conducted under the direction of Dr. Eyster with a view to the development of apparatus for supplying oxygen to aviators at high altitudes. He had instructions from Capt. Payne of the Ordnance and Instrument Section aforesaid to procure such equipment and apparatus as was necessary for the proper carrying out of this work.

II.

Pursuant to such authority and direction of Capt. Edward D. Payne aforesaid, Dr. Eyster at various times ordered from various persons and firms apparatus of various descriptions for use in his experiments. Among other orders he gave to the claimant in or about the month of February, 1918, an order for one rubber belt of appropriate design for use with aviator's oxygen equipment, to be constructed by claimant. This belt was made by claimant and delivered to the Science and Research Division of the Signal Corps in or about February, 1918, was accepted by the said Science and Research Division and used in connection with the experiments mentioned, upon the completion of which it was turned over to the Medical Research Laboratory of the United States Army Air Service, at Mineola, N. Y.

III.

According to the notice of Claim, the cost of the belt was the sum of \$365.40.

CONCLUSION.

The facts found establish an agreement within the purview of the act of March 2, 1919, between the United States of America through Capt. Edward D. Payne and Dr. J. A. E. Eyster and the claimant, Walter Soderling Co., whereby claimant agreed to make and deliver for experimental purposes to the Signal Corps of the United States Army one rubber belt for use with aviator's oxygen equipment, and the United States of America through said Capt. Edward D. Payne and Dr. J. A. E. Eyster promised and agreed to pay claimant the reasonable cost thereof.

There is no evidence before this Board to show the reasonable cost of the belt except the statement of claim, which gives the cost at \$365.40.

DECISION.

This Board will make and transmit a statement of the conditions and terms of the agreement and certificate C to Claims Board, Air Service for action in the manner provided under specification (c), section 5, Supply Circular No. 17 (revised), Purchase, Storage and Traffic Division, March 26, 1919.

Col. Delafield and Lieut. Col. Williams concurring.

Case No. 633.

In re **CLAIM OF SEWELL-CLAPP ENVELOPES.**

- 1. NEGOTIATIONS MERGED IN WRITTEN CONTRACT.**—Where the officer who negotiated a formally executed contract agreed that a contractor might use 500-pound cases but the contract thereafter executed stipulated 300-pound cases, and the Government inspector refused to accept the larger cases, claimant is not entitled to relief under the alleged oral agreement, because such oral agreement was merged in the written contract.
- 2. JURISDICTION.**—The Secretary of War and the Board of Contract Adjustment have no jurisdiction to amend the formal contract, because it has been terminated by performance.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral agreement made prior to execution of a formal contract relating to the same subject matter, namely, envelopes. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

STATEMENT OF FACTS.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board, Director of Purchase, of a claim for \$550 on a formally executed contract under the following circumstances:
2. On or about October 11, 1918, after verbal conversation with Hugh Wright, formerly Captain, Q. M. C., the claimant submitted to the War Department a formal bid for the manufacture of envelopes in accordance with certain specifications, at a price of \$4.60 per thousand, for 2,000,000 envelopes, at the aggregate price of \$9,200.
3. On or about November 6, formal contract was sent to claimant and duly executed, the same providing for the manufacture of 2,000,000 envelopes at \$4.60 per thousand, and in paragraph 10 of schedule A the following appears:

“**PACKING.**—Envelopes to be packed in the usual domestic packages, and contents marked on each package, and cased for overseas shipment. Cases not to exceed 300 lbs. gross weight. Cases to be made of $\frac{3}{4}$ -inch stock, or heavier; corners braced and lined with moisture proof, oiled paper, or other good rust preventative. Nailed with cement coated nails, strapped with cold rolled, unannealed steel, not less than $\frac{1}{2}$ -inch wide, and No. 26 gauge. Straps to be

treated to prevent rust. To be packed in such a manner as to insure safe delivery at destination and to comply with the standard specifications of the War Department as per Supply Circular No. 22."

4. Claimant's contention is that prior to submission of the contract, and at or about the time that it submitted its bids, Capt Wright agreed with it that it might use old packing cases holding about 500 pounds each, but the inspector refused to accept goods packed in 500-pound cases, and compelled claimant to pack in 300-pound cases as provided in paragraph 10, schedule A of contract, *supra*, and that by reason of having to pack the envelopes in 300-pound cases in accordance with said paragraph 10, schedule A of the contract, claimant was compelled to expend the sum of \$550 in the purchase of packing cases to comply with the provisions of said paragraph 10, and it is for this \$550 so expended that it is now making claim.

5. The contract of November 6, 1918, was fully completed and claimant has received its pay under the terms of said contract.

DECISION.

1. All of the alleged verbal agreements with Capt. Wright upon which this claim is based were had prior to the date of and the signing of the formal contract. The conversations and alleged agreements with Capt. Wright were to the effect that the claimant might pack in 500-pound cases. The written contract afterwards entered into by the United States and claimant specifically provided for the packing of the envelopes in cases holding not to exceed 300 pounds. Therefore the verbal agreements on which claimant bases its claim must be considered as merged in the formal written contract.

2. It is a well-known principle of law that all oral negotiations referring to the same subject matter which are afterwards reduced to writing in the form of a contract are, in the absence of fraud or mistake, merged into and superseded by the written contract.

3. It was held by this Board in the case of Chalmers Knitting Co., cases Nos. 451-460, inclusive, decided September 30, 1919, as follows:

"Oral negotiations made before or at the time of the execution of a written contract, concerning its terms or subject matter, are, in the absence of fraud or mistake of fact, merged into and superseded by subsequent written contract."

4. This Board has no jurisdiction in the instant case, for the reason that the formal contract herein has been fully terminated by performance, and, as is said by Col. John R. Delafield in his Notes on the Jurisdiction of the Secretary of War:

"It will be noted, however, that this power of the Secretary of War to settle formal contract by agreement with the contractor rests

wholly upon the existence of the contract itself and can not be exercised where the contract has been *fully executed by performance or terminated by breach*. In such cases the powers and functions of the Secretary of War to amend the contract have ceased and the claims of the parties are merely for damages for some breach of the contract and can only be determined by a court having jurisdiction."

5. All oral agreements having been merged in the written contract afterwards entered into, and the contract having been fully completed by performance, this Board has no jurisdiction to grant relief in this case.

6. For the foregoing reasons the relief asked for must be denied.

DISPOSITION.

1. Final order denying relief will issue.
Col. Delafield and Mr. McCandless concurring.

Case No. 2235.

In re **CLAIM OF RUSSELL ELECTRIC CO.**

1. **REPAIRS—LABOR AND MATERIALS.**—Where fixtures are repaired by a contractor on an order that does not specify the amount to be paid, the Government, having received the benefit of the repairs, is obligated to pay the contractor a reasonable price for labor and materials expended in making the repairs.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for work done and materials furnished in repairing electric fixtures on the oral order of the commanding officer of a medical supply depot. Held, claimant is entitled to relief under the act.

Mr. Harding writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$35, by reason of an agreement alleged to have been entered into between the claimant and the United States. Verbal orders were given to the claimant on or about February 14, 1918, and June 3, 1918, respectively, by Col. John A. Murtagh, commanding officer of the medical supply depot at Atlanta, Ga., for furnishing materials and doing the labor necessary for repairing certain electric fixtures in the office of the medical supply depot. The materials were furnished, work was performed by the claimant immediately upon receiving the orders, and the Government received the benefit of both the materials and the work. No price was specified for the work to be done, and the claims presented are for—

Work done and materials furnished February 14, 1918-----	\$16.50
Materials furnished and work done June 30, 1918-----	18.50
Total -----	35.00

DECISION.

1. This claim is presented in a very informal way, without a formal petition as required by the rules, and simply by presenting invoices with the affidavits of two witnesses attached. Under the powers of the Board to grant amendments, we shall consider the claim the

same as though properly presented. After looking into the facts the Board is satisfied that the Government received the benefit of the materials and the work for which the amount is claimed, hence the above statement of facts evidences a contract between the claimant and the Government whereby the claimant was to do the work required of it, and wherefor the Government agreed to pay the claimant a reasonable price. Claimant has performed its agreement in all respects, and the the Government is now indebted to the claimant in a reasonable amount, which is hereby found to be the sum of \$35.

DISPOSITION.

This Board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield, Lieut. Col. Williams, and Mr. Howe concurring.

Case No. 1722.

In re **CLAIM OF LYBRAND ROSS BROS. & MONTGOMERY.**

- 1. CLAIM AND DECISION.**—Claim is filed under the act of March 2, 1919, for service of auditing at the express request of an authorized Government agent. Held, that claimant is entitled to recover.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This is a statement of claim, Form A, filed originally with the Claims Board, Bureau of Ordnance, and by that Board transmitted here for the reason that it deemed the evidence of agreement insufficient to warrant its action.

FINDING OF FACTS.

The claimants are accountants. In August, 1918, the Worcester Manufacturing Co. and the Worcester Shock Absorber Co., of Worcester, Mass., presented claims against the United States growing out of contracts with the United States for the production of certain munitions to the Boston District Ordnance Office. Levi H. Greenwood, who was at the said time district chief at the district ordnance office, Boston, entered into an agreement with the claimant company for the auditing of the books of the Worcester Manufacturing Co. and the Worcester Shock Absorber Co. The agreement was that the United States would pay the charges of the claimant herein at the rate of \$30 per day for senior accountant; \$20 per day for one assistant; \$15 per day for second assistant, and \$10 per day for tabulating and report writing, such charges being for the number of days actually engaged in furnishing the data requested. This action was taken by Mr. Greenwood pursuant to the following telegram:

"130d hf 45

WASHINGTON, D. C., 11.19 a. m. *Sep.* 14.

PRODUCTION MANAGER

Boston Mass.

Your wire four one two three request you obtain competent cost accountant to make audit Worcester Manufacturing Company's cost books stop this preparatory to recommendations their claim for damages.

WILLIAMS.

Production Divn Two Eight Six Three Nine Army Ordn 1236 p"

It appears that the claimant company accepted the employment offered and incurred obligations or made expenditures prior to November 12, 1918.

DECISION.

The agreement is determined to be within section 1 of the act of March 2, 1919.

DISPOSITION.

Certificate C will be executed with a document attached showing the nature, terms, and conditions of the agreement, and the said certificate with a copy of this decision and the papers herein will be transmitted to the Claims Board, Bureau of Ordnance, for further proceedings pursuant to Supply Circular 17.

Col. Delafield and Mr. Harding concurring.

Case No. 1967.

In re CLAIM OF SCIENTIFIC UTILITIES CO., INC.

1. **FORMAL CONTRACT.**—Where the contracting officer entered into a written contract, "Subject to the approval of the Surgeon General," and the Surgeon General did not approve same, the contract is informal and invalid.
2. **INFORMAL CONTRACT.**—Where an informal contract was entered into November 15, 1918, the Secretary of War has no authority under the act of March 2, 1919, to adjust the same.
3. **CLAIM AND DECISION.**—Claim is filed under the act of March 2, 1919, for \$150, for loss alleged to have been sustained by reason of the suspension of an informal written contract entered into November 15, 1918. Held, claimant is not entitled to recover.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Office of Director of Purchase, on a claim for \$150 on an informally executed contract, under the following circumstances:
2. On November 15, 1918, M. A. Reasoner, Lieutenant Colonel, Medical Corps, a contracting officer, entered into a written contract, F. M. S. D. No. 136, with the claimant for the purchase of 1,000 separatory funnels, at a unit price of \$1.15, to be shipped on or before November 22, 1918.
3. The contract contained this provision: "This contract shall be subject to the approval of the Surgeon General, U. S. Army." The contract was signed by the contracting officer and by the claimant, but was not approved by the Surgeon General.
4. Claimant appears to have manufactured the 1,000 funnels. Five hundred were taken and paid for. The Government refusing to take the remaining 500 funnels, claimant insists that it should be paid 30 cents each for its loss, or \$150.

DECISION.

1. The contract is governed by section 6853-c, Compiled Statutes, which provides that the contracts of the Medical Department which are not to be performed within 60 days and are in excess of \$500 in

amount, shall be reduced to writing and signed by the contracting parties, "but in all other cases such contracts shall be prepared under such regulations as may be prescribed by the Surgeon General."

2. Pursuant to the authority of this section, the Surgeon General has prescribed, *inter alia*, the following regulation:

"The contract will be reduced to writing and signed by the contracting parties with their names at the end thereof, in every case where the amount to be paid thereunder exceeds \$500, except when a public exigency demands immediate performance and there is no time to reduce the contract to writing. Formal contract may also be made in any other case regardless of the amount involved, when directed by the Surgeon General, or when in the judgment of the contracting officer it will better protect the interests of the United States."

3. A public exigency probably demanded the immediate performance of the contract in question and, therefore, the contracting officer might have elected not to use a formal contract. He did not so elect. That he prepared, signed, and obtained the signature of the claimant upon the contract in question is sufficient evidence of his determination, in the exercise of his judgment, that a formal contract would better protect the interests of the United States.

4. The contract containing the stipulation that it shall be subject to the approval of the Surgeon General, and not having his approval, is informal and invalid. *Monroe v. United States*, 184 U. S. 524.

5. The informal contract not having been made until November 15, 1918, there is no authority of law under the act of March 2, 1919, or otherwise, by which the Secretary of War can adjust this claim.

DISPOSITION.

Final order must, therefore, issue denying relief to the claimant. Col. Delafield, Lieut. Col. Carruth, and Mr. Eaton concurring.

Case No. 272.

In re **CLAIM OF RADIANT GLASS CO.**

- 1. STIMULATION OF PRODUCTION.**—Where claimant requested aid of an officer of the Procurement Division, Quartermaster Corps, to obtain a sufficient supply of natural gas, in order to enable claimant to prepare for filling anticipated Government contracts for making lantern globes, and no orders were afterwards given to claimant for making globes and no instructions given to proceed, there was no contract made within the provisions of the act of March 2, 1919, and claimant, in making expenditures in preparing for anticipated contracts, assumed an ordinary business risk.
- 2. CLAIM AND DECISION.**—This is a class B claim under the act of March 2, 1919. Claimant alleges that a contract was made on or about the 21st day of August, 1918, to manufacture lantern globes. Claimant seeks to recover the amount of money which it alleges it expended in procuring materials and equipment, for performing the alleged contract. Held, That claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim. Form B. has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$926.50 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In the summer of 1918 contractors who were furnishing the United States Government with lantern globes were behind in their deliveries, and the Government deemed it necessary to secure other sources of supply.

3. During this time there was some trouble among the gas companies in Arkansas or Oklahoma as to the distribution of fuel. Mr. Parks, president of the claimant company, called upon Mr. (then Maj.) William J. Peck, Chief of Procurement Branch No. 3, Hardware and Metals Division, Office of the Director of Purchase, some time in the early part of August, 1918, and took the matter up with him (Mr. Peck), looking to the obtaining by claimant company of additional fuel. At that time claimant company was in the business of making lamp chimneys for the trade, and, providing it could get

an adequate supply of fuel, and knowing that the lamp chimney was a nonessential, indicated its desire to go into the lantern globe business if possible.

4. On August 10 Mr. Peck wrote the claimant company, among other things, as follows:

"It is anticipated that this department will make considerable use of your facilities for producing lamp chimneys, lantern globes, and tumblers, when and if the latter item is added.

"It is desired by this department that you are supplied with adequate fuel so as to enable you to remain in competition for the business. The matter has been presented to the United States Fuel Administration, who have indicated verbally that proper support will be rendered through that end.

"This communication is based on the fact that lamp chimneys, lantern globes, and tumblers are essential to the needs of the United States Army, both domestic and overseas."

5. In order to assist claimant in obtaining an additional supply of fuel for its plant at Fort Smith, Ark., Mr. Peck wrote to the Fuel Administration, Oil Division, Bureau of Natural Gas, and in reply thereto received a communication dated August 19, 1918, stating that they had written to three companies supplying gas in Fort Smith, Ark., and that one of the companies, to wit, the Traction Co., replied that they would be able to supply them gas temporarily, and continued as follows:

"From this it would appear doubtful if the glass company can secure a permanent supply and if the order given them by you is dependent upon their running with natural gas they will doubtless be delayed in filling the same."

6. Thereafter, on August 21, 1918, at the solicitation of Mr. Parks, president of claimant company, and to further assist claimant company to obtain a supply of fuel, Mr. Peck wrote claimant as follows:

"This letter is to confirm the understanding that we will call on you for at least 50,000 globes within the next 60 days. It is probable that the requirements will exceed that amount."

7. In regard to these communications, Mr. Peck testified (Tr. pp. 6-7) as follows:

"MR. PECK. To the best of my knowledge and belief, Mr. Parks called with some one I was acquainted with. There was a question, apparently, among the gas companies in Arkansas or Oklahoma, from whichever point they drew, as to the distribution of fuel. Mr. Parks led me to believe that he was having a great deal of difficulty. In fact, as I recall it, he was being squeezed out on his supply and he indicated that he was making lamp chimneys for the trade, and knowing that the lamp chimney was a nonessential he thought he would go into the lantern-globe business, if possible. We were half a million globes behind then as against orders. We understood from the requirements branch that they were going to need a great many

more. so that we would have welcomed an additional source of supply. The issue at that moment with Mr. Parks was to get fuel. He stated his willingness to go ahead and get molds and go into the lantern-globe game. The question was if he got into it would we give him the business. Hence my letter. After I wrote to the Fuel Administration and received their reply, as nearly as I can recollect the letter to Mr. Parks was given with the hope that it would bring further pressure on the Fuel Administration. I think a Mr. Gregory at that time had the matter in charge. Mr. Parks went home and, so far as I remember, did not notify me until some time afterwards—I had forgotten how long until my memory was refreshed this morning—that he had gone ahead and that he had been able to get fuel. So far as the department was concerned, we forgot about him as a possible source of supply.

“In many cases we had encouraged people to engage in the manufacture of gas, of which there was a shortage, and my best impression at the moment is that we were influenced more at least by the desire to help Mr. Parks than we were by any thought that he would be immediately beneficial to the Government.”

“Q. In other words, your letter written on August 21 to the claimant was simply a letter for his use in prying, if I may use the expression, the Fuel Administration loose from some fuel?”

“Mr. PECK. Yes, with the further thought that if he got it and prepared to make globes, he would undoubtedly have been able to use that quantity, which was trivial compared to the requisitions going through.”

8. After this letter of August 21, 1918, nothing was heard from claimant by Mr. Peck or anyone in the Procurement Branch No. 3, Hardware and Metals Division, until some two months afterwards, when the following letter was received from the Radiant Glass Co., dated October 1, 1918:

“By Wells Fargo express, charges prepaid, two samples of the No. 30 Railroad Lantern Globe, to fit the Vesta Lantern, have been sent you.

“All material for the handling of the order we have had up with you are now on hand and we are awaiting instructions from you.

“Believe you will find samples up to standard required and that they will be satisfactory in every way.

“You can depend upon the product shipped on your order being equal to the globes sent you.”

9. No contract was ever entered into between Mr. Peck and claimant. Nothing was said at any time about an order being placed, other than the letter of August 21, 1918, *supra*.

10. At that time Mr. Peck, explaining that letter (Tr., p. 10), testified as follows:

“Q. You say ‘This letter is to confirm the understanding that we will call on you for at least 50,000 globes within the next 60 days. It is probable that the requirements will exceed that amount.’

“Mr. PECK. I think not, sir. We could have done that if he had been prepared to take the business.”

"Q. You said that was the understanding, 'that we will call on you for that many globes.' When you said that, was there any understanding that you would take so many globes?"

"Mr. PECK. On the ground that if he was ready to supply the globes on a competitive basis we would take them."

"Q. You were not going to make a contract?"

"Mr. PECK. We were trying to help Mr. Parks, and at the same time we would have gotten another source of supply. As a customary thing you say to a man, 'Your price must be all right, and your quality satisfactory.' That is the common practice. The discussion with Mr. Parks was not sufficiently final to have talked about a contract. If the wording of my letter does not convey that it is certainly apart from the spirit of the talk with him."

11. It was the custom of Mr. Peck's department to encourage new manufacturers of articles that the Government was in need of, and when a manufacturer showed a willingness to turn out an article, the information was turned over to the production and inspection departments for a report on the manufacturer's factory and facilities. No report was ever made on claimant's factory. Mr. Peck had no authority to give a contract, and so testified (Tr., p. 17)—

"Mr. PECK: As a matter of fact, the procurement officer could not give an order, anyway. As far as he could go would be to make a recommendation for an award. It was not final until it was approved by the Board of Contract Review."

12. In the present case, claimant company was in the business of manufacturing lamp chimneys, and was short of fuel. It called upon Mr. Peck primarily for the purpose, so far as the record discloses, of obtaining an increased supply of fuel to take care of its private business, and indicated that, providing it could get an adequate supply of fuel, it would consider entering into Government contracts for the making of lantern globes.

13. The Government officers were looking for additional sources of supply for lantern globes, and took up with the Fuel Administration the matter of an additional fuel supply for claimant company, but by its letter of August 19 the Fuel Administration indicated that no permanent additional supply of fuel could be furnished claimant company.

14. In order to assist claimant in its endeavor to obtain an additional supply of fuel, and with the understanding that should it receive an additional supply of fuel, and thus prepare itself to manufacture lantern globes for the Government, it would enter into negotiations for the supplying of said lantern globes to the Government, Mr. Peck wrote the letter of August 21, 1918.

15. No further negotiations were ever entered into with claimant company for the furnishing of any lantern globes for the Government, and no price was agreed upon, nor any definite amount to be supplied agreed upon.

16. Claimant company, however, as a business risk, and in hopes of later on receiving contracts from the Government for the supply of lantern globes, providing its samples were approved, proceeded to get molds and make samples which it endeavored to deliver, but which were never, in fact, received by the proper officers of the Government. (See letter of Oct. 29, 1918—our file.)

17. Claimant was notified on December 11, 1919, that the case would be set for hearing before this Board, and requesting that claimant indicate its desire as to a personal appearance, and on December 12 replied that it was not its purpose to be present.

DECISION.

1. The act of March 2, 1919, provides:

“That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, * * * entered into in good faith during the present emergency * * * by any officer or agent acting under his authority, direction, or instruction * * * with any person, firm, or corporation * * * for the production, manufacture, * * * or materials, or supplies * * *.”

2. In order that claimant recover herein, it must show that it entered into an agreement, either express or implied, with some officer or agent acting under the direction or authority of the Secretary of War, and upon the faith of that agreement expended moneys or incurred obligations.

3. In the instant case no contract or agreement, either express or implied, for the furnishing of lantern globes was ever entered into between claimant company and any officer or agent acting under the authority, direction, etc., of the Secretary of War, and any expenditures made by claimant company were not made upon the faith of any such alleged agreement, but were made as a business risk, and with the intention of later negotiating and entering into a contract with the Government, providing it could get the necessary fuel and its samples were approved.

4. The letter of August 21 was written merely to assist claimant in getting an adequate supply of fuel, in order that it might qualify itself for later negotiations for a contract to make lantern globes for the use of the Government. It never, however, fully qualified by submitting samples, etc.

5. For the foregoing reasons, the claim herein is denied.

DISPOSITION.

1. Final order denying relief will issue.

Col. Delafield and Mr. McCandless concurring.

Case No. 742.

In re **CLAIM OF BUTLER MANUFACTURING CO.**

1. **PREPARATION FOR AN ANTICIPATED CONTRACT.**—Where claimant made commitments, installed machinery and did experimental work in anticipation of future Government contracts, which it did not obtain, such expenditures not being authorized by an authorized agent of the Government, there is no agreement, express or implied, on the part of the Government to reimburse claimant.
2. **CLAIM AND DECISION.**—Claim filed under the act of March 2, 1919, for \$21,827.54, claimed to have been expended in preparation to perform anticipated contracts, which were never obtained. The evidence showed that there was no agreement. Held, claimant is not entitled to recover.

Mr. Howe writing the opinion of the board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between claimant and an agent of the Secretary of War.

STATEMENT OF FACTS.

1. The agreement is stated in claimant's petition as follows:

"That we were to keep sufficient stock of raw materials, etc., on hand to enable us to promptly take care of waterproof plywood requirements and that we were to prepare ourselves to turn out large quantities of laminated wing beams on short notice."

That claimant made expenditures and incurred obligations on the strength of said alleged agreement as follows:

"Purchased machinery, veneers, spruce, lumber, waterproof glue, etc., in quantities to warrant large production of waterproof plywood and laminated wing beams.

2. The claim as presented on the record and at the hearing divides itself into three parts:

First. For the installation of machinery and equipment.

Second. For the stock of materials accumulated.

Third. Expenses involved in experimental work on laminated wing beams at the request of the Bureau of Aircraft Production.

Claimant bases its claim on alleged representations of Mr. A. C. Burrage, a civilian employee of that bureau, and his assistant, a

Mr. Henry F. Miller. At the hearing the testimony showed that claimant did install certain machinery and equipment, did lay in certain stock of materials and did engage in certain experimental work on wing beams prior to November 12, 1918. The point at issue is whether this was done under any agreement with the Government.

3. A hearing of the claim was held December 12, 1919, at which Mr. E. K. Butler, president of claimant company, and Mr. Burrage appeared and testified.

DECISION.

4. *As to the first item.*—Although claimant alleges that this machinery was purchased at the direction of some one in the Bureau of Aircraft Production, there is no evidence that such directions were given by anyone unless it be Mr. Burrage. It appears from the testimony that claimant, at the time of the transactions with Mr. Burrage relied on, was already engaged on a number of contracts for the production of laminated wood for airplanes, of which the United States Government eventually probably did get the benefit, but that these contracts were not with the Government but with airplane manufacturers for whom claimant was a subcontractor, and that claimant has been paid what is due it on these contracts. The evidence shows that the machinery in question was bought for use on these contracts and also to conduct the experimental work on wing beams described in item 3 of the claim. (See Mr. Butler's testimony, Transcript, p. 38.) Mr. Burrage states that he never gave any directions or instruction to purchase or install this machinery. (Letter A. C. Burrage to Board of Contract Adjustment, Sept. 25, 1919, in record.) (See also Mr. Burrage's testimony, pp. 61-66.) So that no express agreement in connection with the machinery is shown.

As to an implied agreement for reimbursement for the machinery the only possible basis would appear to be in connection with the item of experimental work.

5. *As to the second item, of materials.*—There is no evidence in the record of any authorization to claimant by any officer of the Government to supply itself with materials beyond the needs of the contracts above referred to on which it was a subcontractor. It appears that claimant did lay in a large stock of veneer and Mr. Butler testified that this was done on the strength of *encouragement* received from Mr. Burrage and his assistant, a Mr. Miller. But Mr. Burrage states that he did not authorize the purchase of these materials. (Letter A. C. Burrage to Board of Contract Adjustment, Sept. 25, 1919.) (Testimony, p. 62.) Mr. Miller states the same things (in a letter, Henry F. Miller to Board of Contract Adjustment, Sept. 28, 1919).

Mr. Butler testified (p. 6) :

"But does not say by whom we were written to keep up our stock."

Mr. Burrage states that he does not recall having so written (p. 62), and the only correspondence in the record bearing on the subject does not contain anything amounting to an order or direction to the claimant, and Mr. Butler's testimony is to the effect that this was done only to provide for anticipated business, not actual contracts:

"Q. In other words, the entire bill of lumber was ordered not on any specific order or contract with the Government, but was ordered to place you in a position to fulfill expected contracts?"

"A. That was it exactly." (Testimony, p. 28.) (See also Testimony, pp. 29, 30, and 31.)

There is no evidence, however, that such expected contracts were either ever given or promised. It does appear, however, that these materials were used in part in the experimental work described in item 3 below. (Testimony, p. 10.) The claim, therefore, for the cost of materials, like that for the cost of the machinery, must rest on the experimental work.

6. *As to the third item for experimental work.*—The material facts in regard to this are embraced in the following testimony of Mr. Butler, Mr. Burrage, and Mr. Miller.

Mr. Butler testified (Testimony, pp. 11-23) :

"I introduced myself to Mr. Burrage and solicited his attention as regarded our ability to make laminated panels especially. * * * And during our conversation, whether he approached this or whether I did, the idea of the great waste of lumber being used in the manufacture of wing beams was brought up and I told him we had made some little headway in experimenting in making laminated wing beams, * * * and he said that was very interesting, that he felt that was something that was going to be very important. * * * But it was suggested to me when I left, 'I wish you would make other specimens and send them out to Madison, Wis., laboratories, and have them send me back data of what they think of them, or what they are.' The Madison, Wis., laboratories were taken over by the Government and that was their final check up on all of that sort of business. * * * And at the same time I put myself, I guess, in a fair light before Mr. Burrage as regards being able to make laminated three-ply panels, etc. Mr. Burrage told me that I would have to be put on the preferred list, or something of that sort in order to be recommended to the different manufacturers of airplanes, as qualified. We had to stand a certain test to show certain qualifications for doing the work before the Government would permit us to do any work for these different manufacturers. * * * After Mr. Burrage received data, I suppose, from Madison, we had talks over the telephone in regard to furthering the proposition. * * *

"We designed a splice. * * * and I sent it on to Mr. Burrage, and over the phone he said he thought it was something desirable, and he desired me to make up some specimens and get at least one made up with that joint and send it out to Madison. * * *

"And I said that of course the expense was very doubtful, and so on, and freight was awfully slow; and I suggested, 'Well, I can go out there with it myself and bring it right back and have it attended to right straight off.' And he said, 'I wish you would.'
* * *

"No. We did not order any great amount of materials until we had got in to it so far that we were encouraged to believe positively that we were going to be wing-beam manufacturers.

"Q. On what did you base that encouragement—that positive encouragement you speak of?

"A. On what Mr. Burrage had told us in regard to it.

"Q. What you have related already?

"A. Talked of it, and Mr. Miller, his assistant, visited us on many occasions every little while, and wing beams were his main enthusiasm in the conversations he had with us. * * * And he had encouraged us to believe—and I thought he was honest and thought it—I know he was for that matter—that we were particularly fitted for manufacturing wing beams, and he wanted us or advised us to get in shape and not to get into the laminated panels any stronger than we were; that he wanted our plant for wing beams. * * *

"Q. When did you show them you had a satisfactory panel?

"A. I think the only time we got any proof of that sort of thing and probably had shown it, Mr. Burrage ordered those six wing beams.

"Q. Was it a written order?

"A. Yes, sir; and he wanted them sent out to Madison, Wis., as soon as we possibly could get them out there and get data on them.
* * *

"Q. Were the tests satisfactory?

"A. Yes.

"Q. Did they accept the six wing beams?

"A. Oh, they accepted the six wing beams.

"Q. And the Government paid you for them?

"A. Yes.

"Q. When did you get the next order?

"A. The next order I got was for a hundred wing beams.

"Q. Have they been delivered?

"A. Yes.

"Q. And paid for?

"A. Yes.

"Q. And what other orders did you get?

"A. Those are the only orders we had on wing beams.

"Q. That is, 106?

"A. 106.

"Q. What were you paid for these wing beams?

"A. To the best of my recollection we were paid about \$1.25 a foot.

"Q. That included labor and material and everything that entered into it?

"A. Yes, sir.

"Q. And your profit, or whatever it was?

"A. Yes, sir. * * *

"Q. Mr. Butler, all of your experimental work that you are claiming for was done before you received these orders for the six wing beams and the 100 wing beams?

"A. Yes; practically all.

"Q. And you figured at that time that the experimental work you had gone to would be amortized in future contracts?

"A. Sure, I never thought of any such thing as this. * * *

"Q. And you went ahead just as any business man would to perfect your ideas in order to put this up to the Government not only as a patriotic proposition but as a business proposition?

"A. Certainly.

"Q. You did not expect all this lumber to go into the experimental work you conducted?

"A. No.

"Q. But you expected it to go into future orders that you expect to get.

"A. Yes, sir.

"Q. But you had not received them at that time?

"A. No."

Mr. Burrage testified (Testimony, pp. 54-60) as follows:

"I told Mr. Butler that we were not giving any orders directly for plywood, that as far as the wing beams were concerned we were interested in getting all possible information, and that we had talked to other people. * * * It was not for several months after that that we issued the first orders for these six wing beams. They were for experimental purposes, * * * testing purposes, at the laboratory, to see how strong they were, and we gave these orders to ten or twelve companies. One of these companies was Mr. Butler's company. * * * We had a conference at Dayton and Mr. Butler and several other manufacturers attended.

"Q. Did you send for Mr. Butler to come to Dayton?

"A. Yes; I invited him to come with several others, and at that conference we told Mr. Butler that we were absolutely certain that these fabricated wing beams would be used, and we told him we believed his factory was equipped to make them and that he would be one of the companies that would receive orders for the wing beams. * * *

"Q. Did you ever tell Mr. Butler to go ahead with the experimental work, with these wing beams?

"A. We gave him these orders, which were considered as experimental. They were all going to be broken up. There was not a single one that would go into a machine. There were about 600 beams all for testing purposes to see whether they were satisfactory, and he knew it, and we gave him a definite price for those beams. We said we would buy them at such and such a price * * * and it was figured out they would make a reasonable profit if they were made in large quantities. We all knew that making a hundred wing beams at that price would not cover the cost, because they were so few in number. If he had gotten an order for 5,000 or 10,000 wing beams at that price he would have made money * * * but we did not want to establish a high price, and they all agreed they were willing to take the order at that price. I have no doubt that Mr.

Butler did the work that he claims, that his men spent the time on it, but it was never authorized by us. The only authority we gave him was the order for the specified number of wing beams.

"Q. In other words, you told him that if he would submit a sample which was satisfactory, you knew he would get orders?

"A. We did not know at that time that the wing beams would absolutely be used. We simply felt that there was a possibility at that time that they would be used * * *.

"Q. Did you know Mr. Butler was going ahead with experimental work before the orders for the authorized experimental work?

"A. We knew he was doing some work on that.

"Q. What was your idea that the work was being done for?

"A. For his own benefit, to prepare for handling future orders. That was the natural course for a manufacturer to pursue.

"Q. Did you have authority to authorize him to make experimental work at the instance of the Government?

"A. Not by myself; no.

"Q. Did you do so?

"A. I did not."

The testimony seems to us sufficient to rebut any conclusion to the contrary that might be drawn from the letters from Mr. Burrage to claimant in the record.

See also letter, Henry F. Miller (Mr. Burrage's assistant) to this Board, September 18, 1919, as follows:

"The Butler Manufacturing Company made sample laminated wing beams in various ways for a number of months before the department with which I was connected came in contact with them directly. From early in 1918 on, the value of their work was recognized, and they continued their experiments with suggestions from different ones in the Government service. They were finally given a trial order for six built-up wing beams, and at this time naturally started preparations to get on a production basis if called upon to do so, which seemed quite likely. This lot of six sample beams showed them to be the best prepared, through experience and equipment, to start immediately production of laminated wing beams for the airplane plants."

7. The evidence in this case is not sufficient to support claimant's allegation of an agreement by which it was to keep up a stock of materials for plywood and prepare itself for quantity production of wing beams. The evidence does not show any such agreement or that whatever claimant may have done in this respect was done pursuant to any agreement.

As to the expenditures and obligations incurred by complainant the evidence shows that they were so incurred for the purpose of filling certain contracts which it already had as a subcontractor, and also for conducting certain experimental work to prepare itself for future wing beam manufacture, in the course of which experimentation it did receive two orders.

8. But it is also apparent from the evidence that it has been paid what was due it on its contracts as a subcontractor, and that no express or implied agreement to reimburse it for its outlays for machinery and materials used in these contracts was ever made. Also that no express agreement was ever made to reimburse it for outlays or expenses in connection with the experimental work. No agreement can be implied in the case of the experimental work because that portion of this work which resulted in actual orders was paid for at an agreed price, and the rest of the experimentation was conducted by claimant in the course of business in preparation for orders that it anticipated but which had not been promised, and as to which it must be deemed to have taken a business risk.

9. There is therefore no evidence of any agreement, express or implied, within the terms of the act of March 2, 1919.

DISPOSITION.

1. The claim should be denied.

Col. Delafield, Lieut. Col. McKeeby, and Mr. Hunt concurring.

Case No. 505.

In re CLAIM OF BICKETT MACHINE & MANUFACTURING CO.

1. **PROPOSAL—NEGOTIATIONS—OBLIGATIONS.**—Where the claimant made a proposal to sell to the United States Government its entire production for the months of November and December, 1918, and January, 1919, consisting of 27 planing machines, or 9 each month, and where the correspondence between the parties tends to show negotiations only, there is no obligation under the act of March 2, 1919, on the part of the United States Government to reimburse claimant for losses sustained by reason of the failure on the part of the Government to take and pay for the machines alleged to have been sold.
2. **CLAIM AND DECISION.**—This claim arises under the act of March 2, 1919, under an alleged agreement under which the War Industries Board is alleged to have agreed to take the entire production of claimant's plant, consisting of 27 planers, during the months of November and December, 1918, and January, 1919. Held, that the negotiations between the parties did not constitute an agreement and that claimant is not entitled to the relief sought.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$34,056.10, by reason of an agreement alleged to have been made between the claimant and G. E. Merryweather, Chief of the Machine Tool Section of the War Industries Board, Lieut. J. A. De Turk of the Plant Facilities Section, Production Division, Ordnance Department, and E. L. Dunn of the Plant Facilities Section, Production Division, Ordnance Department, in behalf of the United States, on or about October 6, 1918.
2. Richard C. Swing, secretary of the claimant, called at the office of Mr. G. E. Merryweather in Washington on or about October 6, 1918, and saw his assistant, Mr. Einig, who informed Mr. Swing that Mr. Merryweather was absent. Mr. Swing told Mr. Einig that the claimant wished to sell to the Government its November, December, and January production of planers, which was a total of 27 planers. Mr. Einig told Mr. Swing that he would report his statement to Mr. Merryweather on his return.

3. On October 17, 1918, Mr. Merryweather telegraphed the claimant as follows:

"Singer Manufacturing Co. will place order for seven planers forty-two inch by twelve foot bed, November delivery. Hold these machines for their order."

(Signed) "WAR INDUSTRIES BOARD MACHINE TOOL SECTION,

"By GEORGE E. MERRYWEATHER."

Correspondence followed between the claimant and the Singer Manufacturing Co. which resulted in a contract for seven planers, which the claimant delivered to the Singer Manufacturing Co. The claimant received payment therefor.

4. Richard C. Swing testified (page 37):

"We interpreted the telegram to mean acceptance of our proposition."

(Page 46:)

"We made arrangements to get materials in to take care of full production—to get out 9 planers each month."

The claimant now asks payment for the cost of said materials less salvage value, amounting to the sum of \$34,056.10.

5. On or about November 3, 1918, Richard C. Swing called on Edward L. Dunn in Washington and was introduced by him to Lieut. J. A. De Turk, and had some talk with Lieut. De Turk regarding planers needed by the Osgood Bradley Co. On November 3, 1918, Mr. Swing returned to Cincinnati, Ohio, and on November 4, 1918, wrote E. L. Dunn as follows:

"Upon my arrival home I took up with Mr. Bickett the question of changing our production so that we could get for Lieut. De Turk the planers he wants for the Osgood Bradley Car. Co. at Worcester, Mass.

"We decided to change our schedule so that we can produce for him and deliver in December the six 48 by 48 inch by 20 foot planers.

"I telegraphed him this morning to this effect and am writing you this information so that you can impress upon him if possible the absolute necessity of quick action if he wants these planers in December."

On November 26, 1918, the claimant wrote Lieut. De Turk, as follows:

"Am writing to find out if possible what has been done with the planers for the Osgood Bradley Car Co., Worcester, Mass. Can you advise us whether or not there is a possibility of this work being carried through. We would also like to know if there is any possibility of quoting you on any other planers you may have in view."

Lieut. J. A. De Turk testified (pages 92 and 93) that in October and November, 1918, he was in the Plant Facilities Section, Produc-

tion Division of the Ordnance Department, that he received quotations of prices of planers from the Bickett Machine Tool Co., which it appeared might be needed at some future date by the Osgood Bradley Car Co., but that he made no agreement with the claimant and had no authority to do so.

6. E. L. Dunn, of the Plant Facilities Section, Production Division of the Ordnance Department, testified (page 84) that it was his duty to handle inquiries of manufacturers who wanted information concerning machine tools; that he had no authority to make contracts (page 86); that he placed no orders with the claimant; and that he introduced him to Lieut. De Turk.

7. G. E. Merryweather testified (page 66) that he was Chief of the Machine Tool Section of the War Industries Board during October and November, 1918; that he had no authority to make contracts, and that he never met Richard C. Swing; and that he never made any agreement with the claimant or gave it any order except that he sent the claimant a telegram dated October 17, 1918, stating that the Singer Manufacturing Co. would place an order with it for seven planers.

DECISION.

1. We find that the telegram from G. E. Merryweather, Chief of the Machine Tool Section of the War Industries Board, to the claimant, dated October 17, 1918, was not an acceptance of claimant's offer to manufacture 27 planers during the months of November and December, 1918, and January, 1919. It was nothing more than an announcement to the claimant that the Singer Manufacturing Co. would place an order with it for seven planers. The said order was placed by the Singer Manufacturing Co. and the claimant received payment therefor.

2. The letter from the claimant to E. L. Dunn, dated November 4, 1918, shows that the claimant at that time was seeking orders for its December delivery from sources other than the War Industries Board. Although prices were obtained from the claimant, no agreement was made with claimant by either Lieut. De Turk or E. L. Dunn. The correspondence corroborates their testimony.

3. We find no agreement was made with the claimant which obligates the Government to reimburse the claimant for expenditures made under the act of March 2, 1919.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 1585.

In re CLAIM OF ECONOMY DRAWING TABLE COMPANY.

1. **AGENCY.**—The War Service Committee on Furniture and Fixtures and Allied Wood Industries was a voluntary trade organization and not an agent of the Government.
2. **ALLOCATION.**—Where the chairman of said organization recommended that an order for 200,000 pick mattock handles issue to claimant, and the chairman notified the claimant that he has so recommended, and claimant incurs expense on the strength of said notice, and the order is never issued by the Government, there is no agreement, express or implied, on the part of the Government to reimburse claimant for expenses so incurred.
3. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$2,640 expenses incurred in preparing to fulfill an order for 200,000 pick mattock handles at \$1.20 per dozen, which order claimant expected to get, for the reason that the chairman of the War Service Committee on Furniture and Fixtures and Allied Wood Industries had recommended him to the Government for said contract, but said order never was issued by the Government. Held, that there is no agreement between the claimant and the Government whereby claimant will be entitled to be reimbursed for expenses incurred.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This is a class B claim, under the act of March 2, 1919, for \$2,640 for expenditures incurred by the claimant in preparing to furnish for the Government 200,000 pick mattock handles under an alleged order said to have been given by Capt. Charles B. Price, purchasing officer, hardwood section, equipment division, Ordnance Department, through P. B. Schravessande, chairman of the "war service committee on furniture and fixtures, and allied wood industries." The war service committee on furniture and fixtures and allied wood industries was a voluntary trade organization with offices at No. 718 Eleventh Street, Washington, D. C., and was in no sense a Government agency. It was made up of representatives from the various manufacturers of the wares referred to in its name, and its purpose seems mainly to have been to obtain for those trades the allocation of Government order.

2. On May 3, 1918, Mr. Schravessande wrote the claimant that the committee of which he was chairman had recommended to Capt.

Price that an order for 200,000 pick mattock handles be given claimant at \$1.20 per dozen, and wired claimant on the following day that an order to this effect would issue in regular course. The same committee, on August 25, 1918, wrote the claimant advising him that this order would be forwarded in due time and adding "it takes all of one month to 45 days to issue these formal contracts. However, do not lose any time. Go ahead with your order and when ready to make shipment asked for crating instructions."

3. Claimant, not having received any but the foregoing order, wrote the said committee as follows:

"We have not yet received this order. Neither have we had approval of sample. On May 4 you wired that orders for approximately 200,000 pick mattock handles, 17 inches long, would be issued to us in the regular course and delivery must be made by September 1. We accordingly made preparations and set up machinery to turn these handles and have also accumulated and made a lot of blanks to be prepared to turn these handles in short order. * * * Kindly look into this matter at once and let us know by wire, * * * when we will get instructions to proceed with the order so as to make delivery."

4. On August 21, 1918, the war service committee wrote the claimant:

"Referring to your letter regarding the 17-inch pick mattock handles, contract for which was to be awarded you, wish to state that we have spent considerable time chasing this order through the various departments with the unpleasant result of the notification that all requirements for handles had been placed."

5. The claimant alleges that on the strength of the instructions contained in the foregoing letter of the war service committee of June 25, 1918, directing it to go ahead with this order, it sawed and had on hand for the manufacture of pick handles about 66,000 blanks for which it now is seeking reimbursement from the Government at 4 cents each.

6. Mr. Schravessande, in an affidavit of November 17, 1919, filed with this Board by the claimant, states that "in the month of May, 1918, deponent was instructed by Capt. Price to order 200,000 trench pick mattock handles from the Economy Drawing Table Co., of Adrian, Mich., and was informed by Capt. Price that a formal order would issue in due course." Capt. Price, both in his testimony at the hearing before this Board on December 29, 1919, and in a letter to this Board of November 20, 1919, and in an affidavit of December 4, 1919, makes it evident that whatever may have been Mr. Schravessande's understanding, no such instructions were given by him to Mr. Schravessande and that no such order was recommended or authorized by him.

DECISION.

In view of all the evidence this Board is of the opinion that no agreement exists between the claimant and the United States within the purview of the act of March 2, 1919, commonly called the Dent Act, and the relief prayed for is therefore denied.

DISPOSITION.

A final order of this Board denying relief will be entered accordingly.

Col. Delafield and Mr. Eaton concurring.

Case No. 2279.

In re **CLAIM OF YORK MANUFACTURING CO.**

1. QUANTUM MERUIT—ADJUSTMENT—CERTIFICATE OF FAIR VALUE.—

Where claimant rendered services and furnished material in receiving, storing, and packing for shipment certain supplies for the overseas Army, the United States Government, having received the benefit of such services and material, is obligated to compensate the claimant for the reasonable value thereof, and where claim was filed too late for adjustment under the act of March 2, 1919, adjustment must be made under section 368, Compiled Statutes, in the Treasury Department, by the use of the certificate of fair value, under *Savage Arms Co. case*, 25 Comp. Dec. 529.

2. CLAIM AND DECISION.—Claim for the reasonable value of its services and material furnished in doing certain storing, packing, and shipping of supplies. Held, claimant is entitled to an adjustment upon a quantum meruit basis, and that the claim should be transmitted to the proper authorities for such purpose.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim has been transmitted to this Board by the Board of Contract Review and Claims Board, Construction Division of the Army, as a class B claim for \$408.40 under an informal contract between the Government and the claimant, alleged to have been dated February 21, 1918.

2. It appears that claim in the form of an invoice was presented to the Construction Division on November 5, 1919, and that it was afterwards filed on Form B. There has been no hearing before this Board.

3. The claimant appears to have rendered services and to have furnished material in receiving, storing, and packing for shipment certain small lots of supplies, destined to the overseas Army. Apparently no price was agreed upon and there is no showing as to the reasonableness of the invoice price.

4. In the statement of claim there is a reference to a written request dated February 21, 1918, ordering the work done. It is stated in the affidavit of Capt. Donald Cole, Q. M. C., that it is his recollection the work was authorized by telephone with the understanding

that it was to be confirmed in writing, but that a diligent search of the files of the Construction Division fails to disclose a copy of any written authorization.

DECISION.

1. In the absence of evidence concerning the exact nature, terms and conditions of the contract it can not be known whether it was executed according to law, as it may have been under section 6853-b or under section 6853 of the Compiled Statutes.

2. If the contract was not executed according to law, there would have been a right to relief under the act of March 2, 1919, had the claim been filed in time; but the claim was filed too late for adjustment under that act.

3. Inasmuch as performance has been made and the Government has had the benefit thereof, the claimant is entitled to adjustment upon a quantum meruit basis. It matters not, therefore, whether the contract was or was not executed according to law.

4. The contract having been fully performed, the claim for compensation is not one which can be adjusted by the Secretary of War. It must be adjusted in the Department of the Treasury. (Compiled Stats., sec. 368.)

5. The claim should be investigated, however, by the proper claims board, the recommendation of which as to amount, with a certificate of fair value, should be transmitted to the Auditor for the War Department for approval and payment.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Board of Contract Review and Claims Board, Construction Division of the Army, for appropriate action.

Col. Delafield and Mr. Huidekoper concurring.

Case No. 489.

In re CLAIM OF WESTERN ELECTRIC CO.

1. **COSTS OF EXPERIMENTATION—TECHNICAL INFORMATION.**—Where it is shown that it was the intention of those representing the Government during the negotiations to reimburse claimant for costs of experimentation and to pay for technical information, at the time of the delivery to the Government of the first substantial order, in connection with the development of an instrument known as a microphone, to be used in trench warfare, and such substantial order was never given, an obligation is entailed on the part of the Government to reimburse claimant such costs of experimentation and the value of such technical information under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—This claim arises under an oral agreement to reimburse claimant for experimental costs and compensation for technical information furnished, in connection with the development of a microphone, for trench warfare use, under the act of March 2, 1919. Held, that the conversations and negotiations between the claimant and the Government amount to an agreement, and that claimant is entitled to the relief sought.

Mr. Wise writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$17,005.05, by reason of an agreement alleged to have been entered into between the claimant and the United States. A hearing was had October 28, 1919.

2. During the month of January, 1918, Capt. E. B. Stephenson, Engineer Reserve Corps, representing the Sound Ranging Personnel, Bureau of Standards, Washington, D. C., visited the laboratories of the claimant and presented to claimant's representatives the problem of developing the microphone so as to make of it an instrument suitable for sound ranging under field conditions in trench warfare. Claimant voluntarily entered into cooperation with the Bureau of Standards for the accomplishment of the object in view.

In April following Mr. Halsey A. Fredericks, representing claimant, called on Maj. W. D. Young, Corps of Engineers, representing the Antiaircraft Development Section. Among other matters the

question of development expenses in connection with future experimental work was brought up. Maj. Young testified (see p. 10, et seq.) as follows:

"In my conversation with Mr. Fredericks I stated to him that we would certainly issue from the office of the Chief of Engineers a requisition covering a certain number of these light microphones and stated, in order that the tub might stand on its own bottom, that it was my desire that the development expenses, notwithstanding the facts that they might seem abnormal, were to be put on the first lot. We had in mind the manufacturing of an initial order and desired that the development expenses incident thereto should be included on the first lot.

"Mr. QUIGLEY. Was an order issued thereafter, Major?

"A. There was.

"Mr. QUIGLEY. Do you know whether the development expense was charged against that order?

"A. It was not.

"Mr. QUIGLEY. Did you have the conversation you speak of with Mr. Fredericks after a talk with Maj. Hodges, of the Engineering Corps, in connection with this work?

"A. At the time of the issuing of this formal requisition from the office of the Chief of Engineers, we had a large number of conversations with the General Engineers Depot, whose office it was to place these orders, after having a conference with us and accepting our plans and specifications.

"Mr. QUIGLEY. Was there any objection to any of these plans?

"A. There was not.

"Mr. QUIGLEY. At the time you speak of, from January to April, 1918, were you authorized to obligate the Government to pay the expense for the development of this apparatus?

"A. I was not restricted. These problems were generally outlined. I was reporting at that time to Gen. Winslow. I reported to several officers during my time in office. *These problems were formally presented to my superior officers, who, I think, at that time was Gen. Winslow, and I was given instructions to proceed as I saw fit.*

"Mr. QUIGLEY. Were such instructions given you in connection with this work?

"A. They were.

"Mr. QUIGLEY. By your superior officer, who you think was Gen. Winslow?

"A. I think so.

"Mr. QUIGLEY. Capt. Stephenson was sent to New York for the purpose of furthering this development work, was he not?

"A. He spent some time there.

"Mr. QUIGLEY. Did you authorize him to have the work commence and proceed?

"A. It is a little difficult to state definitely on that point because there was more or less of an understanding; in other words, we were endeavoring to buy something we did not know existed. Normally, if you want to purchase a piece of apparatus that has been developed, you have a concrete proposition. Here it was necessary to find out what could be done. We determined, after several conferences back

and forth with the Western Electric Co. people, that they could build what we wanted.

"Mr. QUIGLEY. Was it understood between the parties that there was to be development work in connection with this apparatus?"

"A. That was understood.

"Mr. QUIGLEY. They had also an understanding that that development work was to be charged for and paid for by the Government, had they not?"

"A. Well, manifestly *it had to be paid for and I had outlined how these development charges were to be taken care of*. I had stated to Mr. Fredericks and Maj. Hodges, and later to Capt. Stephenson, who raised the point with me. I do not recall how he happened to ask me about it, whether the point was raised by the Western Electric Co. or whether it came up in the course of conversation, but I had stated to Capt. Stephenson, calling his attention to the fact, that we had already stated to the Western Electric Co. that these *development charges* were to be included in the first order and the *matter had been called to the attention of the Chief Engineers Depot and he was acquainted with how these charges were to be taken care of*. In all probability the question had been raised by Capt. Stephenson, due to the fact that the Western Electric Co. had raised some point in that connection.

"Mr. QUIGLEY. Would you say, Major, that it was a mistake on the part of the Western Electric Co. not to have billed the development expenses in connection with the initial order?"

"A. That is a matter over which I had no jurisdiction. It was a matter of bookkeeping.

"Mr. QUIGLEY. But the arrangement was to so bill it?"

"A. That was thrown out as a suggestion by the General Engineers Depot, that the cost of this initial lot, although abnormal, should be included with the first order." (*T. S. pp. 10, 11, 12, 13, 14.*)

3. Claimant manufactured 10 of the devices which were delivered to the Government for test and approval. These were accepted and paid for by the Government and were satisfactory. Orders for additional instruments were not placed, however, for the reason that a change in the sound-ranging system was made. Claimant, not regarding the experimental work as complete until the instrument developed by it had been finally tested and approved, did not include the cost of the experimental work to date in the invoice for the 10 instruments it delivered to the Government for test and approval.

4. This statement of Maj. Young that he had authority to obligate the Government to pay the cost of the experimental work is corroborated by a memorandum of December 3, 1919, which is as follows:

"Memorandum for the Board of Contract Adjustment.

"Major W. D. Young, Engineers, was on duty in this office during the period from October 30, 1917, to July 22, 1918, in connection with the development of sound and flash ranging equipment, and had the authority of the Chief of Engineers to make such purchases as were necessary in connection with this work.

(Signed)

"FREDERIC V. ABBOT,

"Colonel, Corps of Engineers, Acting Chief of Engineers." Google

CONCLUSIONS.

That in or about the month of April, Maj. W. D. Young, Corps of Engineers, representing the antiaircraft development section, possessed authority to obligate the Government to reimburse claimant for the expenses it incurred in connection with the development of a microphone instrument adapted to use for sound ranging, and did so obligate the Government, and that the manner of billing the cost of the said development or experimental work was not of the essence of the agreement into which he entered with claimant who is entitled to be reimbursed for its authorized expenditures without regard to the manner in which it submitted its account.

RECOMMENDATIONS.

That the claim be allowed.

DISPOSITION.

In this case Form C should be issued, together with the accompanying documents setting forth the nature, terms, and conditions of the agreement as herein found to exist, and these papers should be forwarded to the Claims Board, Office of Engineers, for recommendation to the Secretary of War, of a fair and equitable basis upon which the agreement should be adjusted, paid, or discharged, and for further procedure in the manner provided in subsection C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff, revised March 26, 1919.

Col. Delafield, Lieut. Col. Carruth, and Mr. Shirk concurring.

Case No. 280.

In re CLAIM OF NATIONAL CAN CO.

1. **CLAIM AND DECISION.**—Claim is filed under the act of March 2, 1919, for \$12,499.50, expenses incurred preparing to make hard-bread cans at the special request of an authorized agent of the Government. Held, claimant is entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$12,499.50, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. Early in 1918 the Government was in great need of cans for the packing of hard bread for overseas shipment. On March 31 the claimant herein received from the Subsistence Division, Quartermaster Department, the following telegram:

"If you are equipped to turn out in large quantities can to contain one-half pound of hard bread pressed in cracker form similar to Saltine cracker this can after being packed to be sealed by hand at bakery. Kindly send representative at earliest convenience. Request your cooperation in this matter. Wire answer."

On the 5th of April, 1918, claimant replied by wire as follows:

"Can furnish ten thousand half pound compressed-bread cans daily beginning sixty days from acceptance at forty-seven dollars per thousand crated Detroit. Confirming."

3. Thereafter, on April 7, the Quartermaster General wrote the claimant as follows:

"1. Referring to your telegram of April 5th reading as follows: 'Can furnish ten thousand half pound compressed-bread cans daily beginning sixty days from acceptance at forty-seven dollars per thousand crated Detroit confirming.'

"2. *Will you kindly have your representative call to see Cept. Day of the Subsistence Branch, at your earliest convenience?*

"3. It is requested that your representative bring with him sample of can which you propose, or specifications covering same."

In accordance with the request contained in the foregoing telegram, Mr. Neil McMillan, secretary of the claimant company, called

at the office of the Quartermaster General in the city of Washington, and there had a conversation with Maj. McIntosh, Capt. Swift, and Lieut. D. E. Graham regarding the subject of the rapid production of hard-bread cans. During that conversation claimant company was impressed with the necessity of immediately equipping its factory with automatic machinery for the production of large quantities of cans for the packing of hard bread, and in that connection Mr. McMillan testified (Tr. Dec. 15, 1919, pp. 5 and 6) as follows:

"Q. Now, will you just confine yourself to what instructions, if any, were given you by any officers of the Government to purchase that equipment?

"Mr. McMILLAN. Well, we had talked with Capt. Swift and Maj. McIntosh and Lieut. Graham, and what was impressed on us was the necessity of getting equipped to make those things in large quantities.

"Q. Did they at any time give you positive instructions to get this automatic equipment?

"Mr. McMILLAN. Well, just as positive as any order could be given without a written order.

"Q. What was the language they told you?

"Mr. McMILLAN. Well, I asked Lieut. Graham about the number of lines we ought to get and he thought it perfectly safe to get two, but one would be all necessary, and we ordered one."

4. This conversation was confirmed by letter from the Acting Quartermaster-General, signed by Lieut. Col. J. W. McIntosh, of the subsistence division, on May 15, as follows:

"2. Mr. McMillan, of your concern, called at this office to-day, at which time the above subject was thoroughly discussed, with the understanding that Mr. McMillan is to submit sample of a can which, when packed, will be air-tight and waterproof, as well as providing for being opened easily.

"3. The need for cans for hard bread is very urgent and it is earnestly requested that you expedite experiments and report results to this office, together with price per thousand on cans f. o. b. Detroit."

5. Acting upon the instructions of Lieut. Col. McIntosh and Lieut. D. E. Graham, claimant immediately took up the matter of automatic machinery with the Bliss Co., and on May 27, 1918, wrote the Quartermaster General, attention of D. E. Graham, as follows:

"We had a letter from the Bliss Company on an automatic line for making $\frac{1}{2}$ lb. biscuit tin, but they want from four to five months to make delivery. Do you think you could secure an equipment sooner?"

6. On June 14 Lieut. Graham, in response to the question contained in the letter of May 27, 1918, wired claimant as follows:

"Retel thirteenth instant hard bread tins extremely urgent. Will secure priority on equipment and material."

7. In this connection, and in explanation, Mr. McMillan testified (Tr. Dec. 15, 1919, p. 7) as follows:

"Mr. McMILLAN. Bliss and Co. were making machinery and we pretty nearly got in on the first orders—they furnished them to the American Can Co., and we got in at the same time, or very shortly afterwards, but the delivery was not made until quite a considerable time afterwards.

"Q. What particular officer authorized you to get these things?

"Mr. McMILLAN. Lieut. Graham was the one I had most of the talk with.

"Q. And it was on his advice that you ordered this additional equipment?

"Mr. McMILLAN. Yes."

8. Lieut. Graham, in his testimony in regard to the ordering of the machinery, testified (Tr. Dec. 16, 1919, p. 56) as follows:

"Q. Was anything said about installing new machinery at this conference?

"Mr. GRAHAM. Oh, yes; that was understood, that the machine equipment had to be installed—special equipment.

"Q. Were you instructed to have this machinery installed?

"Mr. GRAHAM. Yes.

"Q. By whom?

"Mr. GRAHAM. Col. McIntosh.

"Q. Do you remember just what he said when he instructed you—that is, in a general way?

"Mr. GRAHAM. In a general way at the conference I had in mind particularly, I was told to see that this production was increased as rapidly as possible—see that the manufacturers of hard bread put in the necessary equipment; that the tin manufacturers put in the necessary equipment immediately."

9. Immediately after the conversation with Lieut. Graham and the other officers and the foregoing letters and telegrams, claimant company, on July 12, 1918, ordered from the Bliss Co. one Bliss body maker fitted complete for making Government hard bread cans.

10. On September 20, 1918, it became necessary, to fully equip itself, for claimant to order one Adriance machine fitted for doubling seams on Government hard bread cans.

11. Thereafter the General Can Co. of Chicago, Ill., invented and manufactured for the soldering of Government hard bread cans a soldering machine; and on October 2, in order to comply with the urgent demand of the Government, claimant ordered from the General Can Co. one general can soldering machine fitted for soldering Government hard bread cans.

12. On October 14, 1918, the claimant, complying with the instructions theretofore given by officers of the Government, ordered from the Sundstrom Manufacturing Co. one bottom die and one cover tapping die, and during the same period the National Can Co. itself manufactured certain other necessary tools and dies to complete its

equipment for the manufacturing of Government hard bread cans by automatic machinery.

13. Early in the negotiations claimant submitted bids for the manufacture of Government hard bread cans by hand, and these bids were accepted and several contracts were issued. These contracts were completed and terminated.

14. Acting upon the assurances of Lieut. D. E. Graham and other officers of the Government that large quantities of hard-bread cans were urgently needed, and that claimant would be given large contracts for the manufacture of these cans both by hand and afterwards by automatic machinery as soon as the latter was installed, claimant ordered, on June 24, 1918, 103 packages of tin plate 20 by 28, and on September 30, 1918, 35 packages of tin plate 23 by 23, which material was necessary in carrying out the contracts then on hand and the contracts which had been promised by the officers of the Government for manufacture in the future.

DECISION.

1. This case is almost identical with the case of New Orleans Can Co., decided by this Board and reported in Volume 1, Part II, page 163, Decisions of the War Department Board of Contract Adjustment. The claimant herein, National Can Co., acting upon the authorization, and urged thereto by the duly authorized agent of the Secretary of War, Lieut. D. E. Graham, together with his superior officers, Lieut. Col. McIntosh and Capt. Swift, equipped its factory with a full line of automatic machinery and laid in the necessary stock preparatory to making hard-bread cans for the Government.

2. It is therefore the opinion of this Board that the expense incurred by the claimant company herein was incurred at the request and by the authority of an agent of the Secretary of War, and that the facts herein stated constitute an agreement which is within the purview of the act of March 2, 1919.

3. The claimant herein is entitled to recover for the necessary automatic equipment procured by it, and also for the material purchased for the performance of the contracts which had been promised it, less the salvage value thereof.

DISPOSITION.

1. This Board will make and transmit a document setting forth the nature, terms, and conditions of the agreement, and certificate Form C, to the Claims Board, Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield, Lieut. Col. Junkin, and Mr. Eaton concurring.

Case No. 1203.

In re CLAIM OF PARKER RUST-PROOF COMPANY.

1. **IMPLIED AGREEMENT.**—Where claimant wrote the War Department that it would grant the War Department the unlimited use of its patented Parker process for the prevention of rust, without fees, provided the War Department would purchase supplies, etc., at current prices, which letter the War Department did not answer, and the War Department did order some of claimant's products, and claimant, anticipating large orders, made large commitments on which they lost by reason of not getting the large orders, there is no agreement, express or implied, whereby the Government should reimburse claimant for the loss.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$7,000, loss sustained by reason of large commitments anticipating large orders from the Government which were never received. Held, there is no agreement whereby the Government should reimburse claimant.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$7,000, by reason of an agreement alleged to have been entered into between the claimant and the Secretary of War, on or about the 30th day of March, 1917.

2. On March 30, 1917, H. P. Van Keuren, representative of the claimant, wrote the Secretary of War, stating:

The Parker Rust Proof Co. will agree to grant the War Department the unlimited use of the patented Parker Process for the prevention of rust upon iron and steel, * * * and will agree to permanently waive all license fees or royalties in connection therewith * * * it is expected that the War Department would agree as follows:

"To purchase all equipment, supplies, chemicals, acids, etc., used in and pertaining to the Parker Process at current prices, which are uniform to all licensees."

The Secretary of War did not reply to said letter (testimony, p. 12).

3. The claimant then from time to time wrote letters to different officers of the War and Navy Departments, offering the Parker Rust-

Proofing Preparations free of royalties. Many orders were placed with the claimant.

4. The claimant alleges it purchased large quantities of steel, acids, chemicals, oil, maganese, and other materials, in order to be prepared to fill Government orders when received. On June 21, 1918. it placed an order for 200 tons of manganese dioxide at \$123 per ton. On October 4, 1918, it placed an order for 300 tons of manganese dioxide at \$120 per ton. It canceled the last-named order at a loss of \$2,000 and its loss on 100 tons remaining on hand of the first order was \$50 a ton, or \$5,000, making a total loss of \$7,000 on materials remaining on hand after the armistice.

5. The claimant does not demand reimbursement under any specific contract or order, but claims that as it offered its product to the Government free of royalties, and as the Government placed orders with it from time to time, and as it provided itself with raw materials necessary to make its product, and was thus able to fill the Government orders, the Government is obligated to reimburse it for its loss on said materials which it had on hand after the armistice (pages 10, 13, and 20)..

DECISION.

No agreement was made between the claimant and a representative of the United States in relation to the purchase of raw materials for its product, nor for its entire output, and no obligation rests upon the Government to remunerate the claimant for materials purchased.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 193.

***In re* CLAIM OF THE ROBERTS BRASS MANUFACTURING COMPANY.**

1. **ORAL AGREEMENT.**—Where an authorized agent of the Government ordered claimant, after it had finished an order then on hand, to continue to make faucets, not to exceed 50,000, so as to be ready for the next order, and the next order was never placed, and claimant did manufacture 30,000 of them, there is an agreement on the part of the Government to pay the expense incurred by claimant.
2. **CLAIM AND DECISION.**—Claim is filed under the act of March 2, 1919, for \$10,294.90, the expense incurred in partially performing a verbal order of an authorized agent of the Government. Held, claimant is entitled to recover.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim on Form B has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$12,374.90 (reduced by subsequent adjustment to \$10,294.90) by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The agreement is alleged to have been entered into verbally by the United States, represented by Capt. J. G. Williams, Q. M. C., H. & M. Division, and the claimant some time during the month of August, 1918. The exact date does not appear.

3. From April 1 to August 22, 1918, Capt. Williams served as a civilian, on and after August 22, 1918, as a captain in the capacity of procurement officer in the Requirements Division, under the Director of Purchase. It was one of his duties to procure material needed in emergencies. Emergency orders were known in his division as "red ticket" requirements. They were for things necessary to supply the men overseas. Among these necessities for which Capt. Williams was held responsible were the push-button faucets for canvas bags used for drinking water. It was his duty to see that a supply of these faucets was always ready when needed to put into the bags.

4. Capt. Williams, although not expressly authorized to contract for supplies, was held responsible for having them when needed, and

it was his custom to order them verbally and oftentimes to have them ready to ship before the written order from the purchasing officer was given to the manufacturer.

5. Claimant had manufactured, on orders from the Government, some 350,000 faucets, the price of which had been finally brought down, in the course of quantity manufacture, to 26 cents each. This was understood by both Capt. Williams and the claimant to be the regular price.

6. It had happened repeatedly that the canvas bags had been ordered ahead of the faucets and the claimant had been required to speed up production and to put on extra help in order to get out the faucets by the time they were needed.

7. Some time during the month of August, presumably about the 22d, Mr. Earl W. Roberts, vice president of the claimant, told Capt. Williams he had finished his order for faucets. Capt. Williams told him to go ahead and make not to exceed 50,000 more and have them ready when the orders came. This the claimant did, and when notified later that there would be no more orders it had on hand upward of 30,000 ready for shipment, several thousand ready to assemble, and a considerable amount of material ready for the manufacture of the remainder.

DECISION.

1. There appears to be no room for doubt that an informal verbal agreement was entered into in good faith by Capt. Williams, an officer acting under the direction of the Secretary of War, with the claimant, for the manufacture of not to exceed 50,000 push-button water faucets, at the established price of 26 cents each, and that the Government refusing to accept them, the claimant is entitled to reimbursement.

DISPOSITION.

This Board will make a statutory award in accordance with this decision and transmit the same to the Claims Board, Director of Purchase, for appropriate action and payment.

Col. Delafield and Col. Boggs concurring.

Case No. 2245.

In re **CLAIM OF PAUL J. SUMMERS.**

1. **EXPRESSION OF OPINION.**—An expression of opinion that claimant would probably be promoted does not amount to an agreement to pay claimant an increased salary under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for the difference between salary actually received and salary alleged to be due under an agreement that claimant would be promoted. Held, that the claimant is not entitled to recover.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17, for \$433.33, the difference between the salary paid to Mr. Paul J. Summers of 3120 Utah Street, St. Louis, Mo., and the salary he claims to be entitled to under an agreement alleged to have been entered into between the claimant and Maj. F. Stanger, I. G., U. S. Army.

2. Mr. Summers was a civil service employee at Camp Doniphan in August, 1918, when Maj. Stanger, who knew of the urgent need of clerical service at the St. Louis depot of the Quartermaster Corps, visited the camp. Maj. Stanger found that his services could be spared at the camp and that Mr. Summers was desirous of being located in St. Louis. Mr. Summers had asked for an advance in salary and, because of the recommendations of his superior at the camp, Maj. Stanger ventured the opinion that he would probably be promoted at the St. Louis depot, if his services there justified it.

DECISION.

1. A complete examination of the record shows that the Government entered into no agreement through Maj. Stanger with the claimant as to the rate of compensation he was to receive upon his transfer to the St. Louis depot. Maj. Stanger was without authority to make any such agreement with the claimant, and it is the opinion of this Board that the claimant has failed to show cause justifying an award in any amount.

Col. Delafield and Mr. Montgomery concurring.

Case No. 2013.

In re **CLAIM OF HARPER MANUFACTURING COMPANY.**

1. **RECOMMENDATION OF AWARD.**—Where claimant submitted a bid to manufacture long wool trousers, and the acting chief of the clothing branch recommended that a contract issue, but it never did issue, and claimant was never officially notified of the recommendation, there is no agreement, express or implied, between the claimant and the Government.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$5,627.44 for material for the manufacture of wool trousers. Held, claimant not entitled to recover.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Office of the Director of Purchase, dated August 7, 1919, denying a claim for \$5,627.44, arising from an alleged informal agreement made on or about the 8th day of November, 1918.

2. On September 20, 1918, the claimant submitted a bid in writing for the manufacture of long wool trousers for the United States Army at 69 cents each. On November 1, 1918, a requisition was issued from the Clothing Branch, Uniform Section, Clothing and Equipage Division, signed "H. L. Wells, Acting Chief," recommending to the Contract Branch that a contract be made with the claimant for 36,000 pairs of wool trousers at 69 cents each.

3. H. L. Wells, Acting Chief of the Uniform Section of the Clothing Branch, Clothing and Equipage Division, testified that he had no authority to make contracts; that on or about November 1, 1918, he issued a requisition recommending a contract for 36,000 pairs of woollen trousers in favor of the claimant, and had sent the said requisition to the Board of Review, but that the said contract was never issued, and that no notice was sent the claimant with regard to its bid or the proposed contract.

4. E. C. Malone, secretary and treasurer of the claimant company, testified that on or about the 7th day of November, 1918, he was informed by the National Association of Garment Manufacturers, which had no governmental authority (p. 39), that the said requisition had been issued. The claimant was then manufacturing goods

under other contracts with the Government and continued to manufacture goods under the said other contracts until about the middle of January, 1919. Some time in January, 1919, the claimant was advised to suspend operations under the said other contracts. The claimant settled its claim under the said other contracts with the Government and received payment therefor.

5. E. C. Malone testified that prior to November 1, 1918, the claimant had placed a blanket order for thread, trimmings, and buttons with various parties in anticipation of further Government contracts, and now claims 60 per cent of the price paid by it for said articles, and also 9 cents each on the 36,000 pairs of trousers, making a total claim of \$5,627.44.

DECISION.

1. It appears from the testimony that the formal bid of the claimant was never accepted and that no agreement, express or implied, was made with the claimant for the purchase of said 36,000 pairs of trousers within the provisions of the act of Congress approved March 2, 1919.

2. The decision of the Claims Board, Director of Purchase, denying the claim, is sustained.

Col. Delafield and Mr. Shirk concurring.

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Case No. 2293.

In re CLAIM OF WILLIAM H. LYTELL AND CO.

1. **JURISDICTION—TIME OF FILING CLAIM.**—This Board has no jurisdiction under act of March 2, 1919, of a claim presented December 3, 1919.
2. **SAME—TIME OF ALLEGED AGREEMENT.**—Board has no jurisdiction of an agreement alleged to have been made about August 22, 1919.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral contract whereby claimant agreed to furnish theatrical entertainments in Army camps. Agreement was alleged to have been made about August 22, 1919, and claim was not filed until December 3, 1919. Held, the Board is without jurisdiction to consider the claim.

Mr. Harding writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$1,500, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

1. Claimant alleges that he entered into a verbal contract on or about the 22d day of August, 1919, with the Government of the United States, represented by one J. A. Banta, whereby he, the claimant, agreed to organize a company of three people for the purpose of giving theatrical entertainments in various cantonments in and about the city of New York, and that in and by said agreement the said J. A. Banta guaranteed to the claimant that he would be furnished at least ten weeks' work at a salary of \$225 a week; that relying upon said agreement the claimant himself engaged two people at a salary of \$75 and \$50 a week, respectively, for the said theatrical work, and guaranteed to them at least five weeks' work at those salaries; that in compliance with the agreement the claimant commenced work on September 22, 1919, and gave performances at Camp Dix and Camp Merritt up to and including the 27th day of September, 1919, and that at that time he was notified by the said J. A. Banta that he would have to stop work for a few weeks but that he would be called back again in a short time; that he was definitely notified about five weeks later that his services would be no longer required.

2. The claim was presented to this Board on December 3, 1919, and is based upon damages for the failure of the Government to carry out the above verbal contract, in the amount of \$1,500.

DECISION.

1. The alleged contract was neither entered into nor any expenditures made or obligations incurred upon the faith of the same by the claimant prior to November 12, 1918; nor was the claim presented before June 30, 1919.

In order that this Board should have jurisdiction to consider the claim at all, the contract must have been entered into prior to November 12, 1918, and some expenditures made or obligations been incurred upon the faith of it before that time, and the claim under it should have been presented prior to June 30, 1919.

The Board has no jurisdiction and the claim is dismissed.

Col. Delafield and Mr. Hamilton concurring.

Case No. 559.

In re CLAIM OF DAYTON ENGINEERING LABORATORIES CO.

1. **VERBAL ORDER.**—Where an authorized agent of the Government ordered a contractor to make an extra set of tools and store outside of its plant, so that if its plant was destroyed by fire the manufacture of the ignition apparatus would not be interrupted, and the contractor complied therewith, there is an agreement on the part of the Government to pay therefor.
2. **CLAIM AND DECISION.**—Claim is made for \$34,992.02 under the act of March 2, 1919, for making extra tools for the manufacture of Liberty motor ignition apparatus orally ordered by an authorized agent of the Government. Held, claimant is entitled to recover.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$34,992.02, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. The claimant corporation is commonly known as the Delco Co. and is well known as the manufacturer of the Delco system of ignition. This system was adopted by the Bureau of Aircraft Production as the system for use on airplanes equipped with the Liberty motor. It was important that the manufacture of the Delco ignition sets should not be interrupted, as the claimant corporation was the only plant in the country that could produce them. The tools which were used in their manufacture were many and complicated.

3. In November, 1917, Col. Deeds, who was then at the head of the Aircraft Production Board, and Lieut. Emmons, who had special charge of these matters, were apprehensive of a fire, or explosion, or some other accident to the Delco plant which would put an end to the production of the ignition outfits. They determined that it was essential in order to insure uninterrupted production of the ignition systems that an additional set of tools be made and that this set should be stored in a safe place outside of the claimant's plant. They had reason to fear also that some agent of the nation with which we

were then at war would attempt to destroy the claimant's plant. They also had in mind that it might be necessary or advisable for another factory to be built in another location which was capable of supplying the same kind of ignition system. For these reasons Lieut. Emmons, after conference with Col. Deeds, directed the claimant to manufacture an additional set of tools.

4. The claimant corporation was unwilling to make the extra set of tools, and its president stated to Lieut. Emmons that they could get along with such tools as they had on hand. Lieut. Emmons insisted on the manufacture of the extra set, the claimant corporation yielded, and the extra set was manufactured and stored in a storage warehouse of the Lincoln Storage Co., Dayton, Ohio. The claim is for the cost of the manufacture of this extra set of tools, less the amount already paid.

DECISION.

1. There is no doubt as to the right of Col. Deeds and Lieut. Emmons acting under him to order the Delco Co. to make an extra set of tools for the manufacture of the ignition outfits. The evidence of the claimant's witnesses and of Lieut. Emmons leaves no doubt that the claimant corporation was directed to manufacture the extra set of tools. The tools having been manufactured in accordance with orders, the claimant is entitled to relief.

2. It appears that the cost of this extra set of tools was to have been absorbed in the price paid for the completed ignition sets which the claimant continued to manufacture up to the date of the armistice. A portion of the cost of the extra set has been absorbed. The Delco Co. is entitled to the unabsorbed amortization of the cost of the extra set of tools, less their salvage value.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms and conditions of the agreement and certificate C to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield, Lieut. Col. Williams, and Mr. Shirk concurring.

Case No. 1959.

In re CLAIM OF HARDAWAY CONTRACTING COMPANY.

1. **CONSTRUCTION IN LIGHT OF CONTEXT—COST OF DEFENDING LAWSUITS.**—A clause of a written contract is to be construed in the light of its context. So where a contract for the construction of a cantonment provides that the Government shall reimburse the contractor for the cost of the work, specifying *inter alia* "such losses and expenses not compensated by insurance," and the contractor incurred expenses in successfully defending certain damage suits. Held, that such expenses were not covered by the above-quoted clause, construed in the light of its context, which related to bonds and various kinds of insurance.
2. **CLAIM AND DECISION.**—Claim presented under G. O. 103 for expenses incurred in defending two lawsuits, and based upon provisions of a formal contract for construction of a cantonment. Held, claim should be disallowed.

Mr. Harding writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with G. O. No. 103, War Department, 1918, and is forwarded to us from the Claims Board, Air Service. It is made up of two claims which aggregate \$1,196.96, under the following circumstances:

A formal contract was entered into on the 11th day of June, 1917, between Hardaway Contracting Co., of Columbus, Ga., the claimant here, of the first part, and the United States of America by Maj. W. A. Dempsey, Q. M. U. S. R., called the contracting officer, acting by authority of the Secretary of War, of the second part, for the construction of a cantonment at Columbia, S. C.

Article II of said contract provides as follows:

"*Cost of the work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(a) Provides for reimbursement for labor, material, tools, etc.

"(b) Provides for reimbursement for subcontracts.

"(c) Provides for reimbursements for rentals paid by contractor for divers articles, etc.

"(d) Loading, unloading, transportation, etc., construction plant.

- "(e) Transportation backward and forward of field forces, etc.
- "(f) Salaries of resident engineers, superintendents, etc.
- "(g) Buildings and equipment required for necessary field officers.
- "(h) Such bonds, fire, liability, and other insurance as the contracting officer may approve or require; and such losses and expenses not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor. Such losses and expenses shall not be included in the cost of the work for the purpose of determining the contractor's fee. The cost of reconstructing and replacing any of the work destroyed or damaged shall be included in the cost of the work for the purpose of reimbursement to the contractor, but not for the purpose of determining the contractor's fee, except as herein-after provided.
- "(i) Permit fees, deposits, royalties, and similar items of expense.
- "(j) Such proportion of the transportation, traveling and hotel expenses of officers, engineers, etc., actually incurred in connection with the work.
- "(k) Such other items as should in the opinion of the contracting officer be included in the cost of the work."

Article IV:

"*Payments.*—On or about the seventh day of each month the contracting officer and the contractor shall prepare a statement showing as completely as possible: (1) the cost of the work up to and including the last day of the previous month, (2) the cost of the materials furnished by the contracting officer up to and including such last day, and (3) an amount equal to three and one-half per cent ($3\frac{1}{2}\%$), except as herein otherwise provided, of the sums of (1) and (2) on account of the contractor's fee; and the contractor at such time shall deliver to the contracting officer original signed pay rolls for labor, original invoices for materials purchased, and all other original papers not theretofore delivered supporting expenditures claimed by the contractor to be included in the cost of the work. If there be any item or items entering into such statement upon which the contractor and the contracting officer cannot agree, the decision of the contracting officer as to such disputed item or items shall govern. The contracting officer shall then pay to the contractor on or about the ninth day of each month the cost of the work mentioned in (1) and the fee mentioned in (3) of such statement, less all previous payments. When the statement above mentioned includes any work of reconstructing and replacing work destroyed or damaged, the payment on account of the fee in (3) for such reconstruction and replacement work shall be computed at such rate, not exceeding three and one-half per cent ($3\frac{1}{2}\%$), as the contracting officer may determine. The statement so made and all payments made thereon shall be final and binding upon both parties hereto, except as provided in Article XIV hereof. The contracting officer may also make payments at more frequent intervals between the dates above mentioned or for other lawful purposes. Upon final

completion of said work the contracting officer shall pay to the contractor the unpaid balance of the cost of the work and of the fee as determined under Articles II and III hereof."

Article XIV:

"Settlement of disputes.—This contract shall be interpreted as a whole and the intent of the whole instrument, rather than the interpretation of any special clause, shall govern. If any doubts or disputes shall arise as to the meaning or interpretation of anything in this contract, or if the contractor shall consider himself prejudiced by any decision of the contracting officer made under the provisions of Article IV hereof, the matter shall be referred to the officer in charge of cantonment construction for determination. If, however, the contractor shall feel aggrieved by the decision of the officer in charge of cantonment construction, he shall have the right to submit the same to the Secretary of War, whose decision shall be final and binding upon both parties hereto."

2. Some time in September, 1917, a fire broke out either upon the Government reservation where the cantonment was being built, or away from it, or both, which extended to adjoining property belonging to one Frank Hampton and others, and did considerable damage to standing timber. In December, 1917, a suit was brought by the said Frank Hampton and others against the Hardaway Contracting Co. claiming that it willfully, negligently, and recklessly started the fire upon the Government reservation, and willfully, negligently, and wantonly allowed the same to spread to the premises of the plaintiffs in that suit, to their damage. The basis of the suit was the negligence of the Hardaway Contracting Co. The Hardaway Contracting Co., the defendant in that suit, answered denying negligence, denying also that it was a separate contractor doing business upon the Government reservation, but that it was the agent of the Government in doing the work there. The case was tried and a verdict for the defendant rendered February 21, 1919.

3. The claimant in this case, the Hardaway Contracting Co., and the principal contractor, entered into a subcontract with the Walker Electric & Plumbing Co. for doing certain work in the construction of the cantonment. One Walter Walsh was an employee of the Walker Electric & Plumbing Co., the subcontractor. On or about January 2, 1919, Walter Walsh, as plaintiff, brought suit against the Walker Electric & Plumbing Co., and joined as defendant the claimant here, the Hardaway Contracting Co. The suit was based on the negligence of the defendants in not providing a safe place for the employee Walsh to work in, and also negligence in providing an unsafe place and leaving obstructions in the way by which the plaintiff was injured. A verdict was had against the Walker Electric & Plumbing Co., but the plaintiff was nonsuited as to the Hardaway Contracting Co. and the suit was dismissed as to it.

4. The claimant employed attorneys to defend it against both of these suits, and in the Hampton suit paid out as attorney's fees and expenses \$771.96, and in the Walsh case \$425. This claim is filed for reimbursement for attorney's fees so paid out.

DECISION.

1. This claim arises on a formal contract and whether or not the claimant can recover depends solely upon its construction. The nature of the claim is such that no recovery can be had for the attorney's fees in question unless the Government in the contract expressly agreed to pay them. In construing written contracts we must be governed by the usual legal rule of construction, and where there is no ambiguity, as there is none in this case, we must find the meaning from the contract itself and not elsewhere. We have no aids to construction except the words found within the contract itself.

The contract does not in terms say that the Government will pay the claimant's attorney's fees or other personal or collateral expenses arising out of happenings during the time that it is performing the Government contract. There is no such engagement by the Government and no reference whatever to such expenses unless found in subsection (h) Article II of the contract.

The contract is a very elaborate one, made up of a preamble, a number of recitals, and Articles I to XV, inclusive. Each article deals with a different set of things and Article II is entitled "Cost of work," that is to say, the cost of the work to be done for the Government under the contract, the expenditures in the performance of the work in which the Government was interested, but only such costs or expenditures as are covered in the 11 subsections of Article II lettered from (a) to (k), inclusive. Taken together with the general heading of the article each subsection is a contract for reimbursement for the things only which are found within it, and are thus associated things. As examples: (a) is labor, materials, tools, etc.; (c) rentals; (d) transportation of stuff; (e) transportation of men, etc. This brings us to the direct consideration of subsection (h). This item deals with such bonds, fire insurance, liability insurance, and other insurance as the contracting officer may approve or require; and then separated only by a semicolon goes on to say: "and such losses and expenses, not compensated by insurance or otherwise, as are found and certified by the contracting officer to have been actually sustained (including settlements made with the written consent and approval of the contracting officer) by the contractor in connection with said work, and to have clearly resulted from causes other than the fault or neglect of the contractor."

We are called upon to determine the meaning of this clause in the relation in which it stands to the first clause of the subsection (h)

and to the subject or subjects with which subsection (h) deals. It is contended on behalf of the claimant that the above-quoted clause of subsection (h) should be treated as though it stood alone or as though it were a separate article of the contract, agreeing to indemnify the claimant against every possible expenditure required of it for any purpose, personal or contractual, and by whomsoever required, if it was required of the claimant while the contract was being performed and which might not have arisen if some one else and not it had been performing the contract. We can not give the clause so broad a construction. Had it meant any such general indemnity it would have stood out alone as a most important clause of the contract, or at least would not have been commingled and associated with the other expressions to be found in the same subsection. The rule for the construction of written contracts or other written documents, to construe the words in the association in which they are found—*Noscitur a sociis*—is a safe rule. We hold, then, that the clause in question in the connection in which it is found means only that the contractor should be reimbursed for the premiums upon such bonds, and insurance, if required or approved, and for such losses or expenses not compensated for by such bonds, fire insurance, liability insurance, or other insurance, and which might have been covered by indemnifying instruments of like character had they been taken out by the claimant upon the work it was doing for the Government. The claimant probably had no insurable interest in the neighboring lands, but if so the evidence shows that it was not its fire, nor any with which it had anything to do. It was in no way connected with the Government work and was not one for which the claimant was responsible. In such circumstances the Government was not interested, and it is clear did not contract to pay lawyers' fees for defending any and every improvident law suit that might be brought against the claimant.

What we have said about the construction of subsection (h) applies equally to the lawyer's fees paid out by the claimant to defend itself from the charge of negligence in the Walsh suit (Item 3, Findings of Fact). He was the employee of the Walker Electric & Plumbing Co., an independent subcontractor accepted by the Government for the particular work which it was doing. Walsh sued his employer and improvidently joined the claimant as a defendant. He was properly nonsuited as to the claimant. He had nothing to do with the performance of the claimant's work for the Government, nor had his lawsuit. Subsection (h) is not a contract by the Government to reimburse the claimant for its attorney's fees in the Walsh suit; they were not costs or expenditures in the performance of the work.

2. Even if subsection (h) should be given the broadest construction, we are of opinion that it can not be construed as a contract on the part of the Government to reimburse the claimant for its attorney's fees paid out in defending itself from any charge of negligence whatsoever that could be brought against it. It is inconceivable that the Government would contract itself into such an inconsistent position. By making such a contract it would be to the Government's advantage to assist in defeating the party to the suit whose expenses it had agreed to pay if it won and would not be liable for if it lost. If the contract means what it must mean, if the claimant is to recover, there is no escaping this conclusion. Neither Governments nor men make such contracts and it is impossible that the minds of the parties could have met in any such agreement, and upon it being called to their attention we should expect that the officers of the claimant and the officers of the Government would alike disavow such intention.

And if there was no such agreement the claimant can not recover here. The whole matter was not within the contract nor connected with the work.

When the Hampton suit was brought the defense thereof was tendered to the Government and thereupon Brig. Gen. I. W. Littell, Q. M. C., in charge of cantonment construction, caused the opinion of the Judge Advocate General to be taken as to Government liability, A copy of Article II, so far as applicable to the question, and a copy of the plaintiff Hampton's complaint in the damage suit accompanied the request. The Acting Judge Advocate General concluded a somewhat lengthy opinion as follows:

"I am of the opinion that the case presented is not a case wherein the Government is interested and that the defense should be made by the Hardaway Contracting Co. at its own cost, and if any judgment is recovered against it, it would not be a proper charge against the Government under the contract cited."

It might be contended that the opinion should not be regarded as controlling because rendered before the verdict and judgment for the defendant (the claimant here); but the opinion was rendered from an examination of the contract and by a construction of it as this one is, and ought to have and has great weight as corroborative of the conclusion arrived at by us. The fact of the verdict did not change the contract or its application or the complaint in that action. They were the same then as now.

Recurring again to the Walsh case. The liability of the Government for attorney's fees therein seems to us to be controlled by a decision of the Comptroller of the Treasury, dated June 13, 1919. In that case it was agreed that the contractor should furnish "all

the labor, tools, machinery, equipment, etc., and do and perform all things necessary to design, construct, and equip" said plant, and that the United States should "bear all costs and expenses of every character necessarily incurred in designing, constructing, and equipping the plant," including a pro rata share of the contractor's overhead expenses properly attributable to the work; and the contractor should make all necessary expenditures in respect to the costs and expenses mentioned, and it would be reimbursed by the United States upon the presentation of satisfactory evidence; and that the contractor might perform any of the work through subcontracts, etc. The contractor made a subcontract with another company to do a certain part of the work at a fixed price. One of the employees of the subcontractor sued the subcontractor for wages and the subcontractor made a claim for legal services rendered it in defending an action of an employee for wages. The contractor paid the amount, apparently, or at least put in its claim to the Government for the amount of the attorney's fees for defending the subcontractor against the suit of the employee in the case in question. The Comptroller, in rendering his decision, rules against the item in question, saying in the case of Everly M. Davis Chemical Corp.:

"The obligation of the Government is defined by its contract. * * * Disputes between a contractor and employees as to pay are undoubtedly expected. * * * The contract could not and did not impose upon the Government the expense of determining an employee's right to pay through legal action. The expense the subcontractor was put to in determining the right of the employee to pay is not a cost that can be claimed of the Government by the contractor."

That case is not on all fours with this one, but we regard it as involving the same principle and the Comptroller's decision in that case as controlling in this one.

3. In the itemized bill for attorney's fees and expenses making up the item of \$771.96 above set forth, there appears to be charged \$625 for attorney's fees and \$146.96 for witnesses' fees and expenses and for court stenographers in the Hampton case. It would appear that where a judgment is rendered for the defendant the judgment would include witness fees and such other expenses as might be taxable under the laws of the place where the suit was brought. In some jurisdictions also a judgment in favor of the defendant is supposed to place him in *statu quo ante* by including within the judgment a taxable attorney fee. It does not appear in this case whether either or any of these items were so included, and it is pressed upon us on behalf of the Government that in any disposition of the case these facts should be asserted and passed upon.

4. It is insisted also upon the part of the Government that in order that this claim, or any claim, might be paid to the claimant, it is a condition precedent that it should have proceeded under Article IV of the contract; that is to say, that on any claim which the claimant might conclude to make against the Government he should have placed the matter before the contracting officer of the Government and have asked him to certify the same under the said Article IV; and then if there was a disagreement as to whether or not the claim was a proper one to be certified the same should be settled by submission to the Secretary of War under Article XIV of the contract; that is to say, that the jurisdiction to settle the same under Article XIV of the contract depends upon the regularity with which the claimant has pursued its claim in accordance with the precise terms of Articles IV and XIV.

There seems to be some merit in both of the contentions made in item 3 and this item 4 of the opinion, but in the view which we have taken of the case and the construction of the contract, it is not necessary to decide them.

The claim should be disallowed.

Col. Delafield, Mr. Bayne, and Mr. Hamilton concurring.

Case No. 2164.

In re CLAIM OF H. N. WHITE CO.

1. **CONSTRUCTION.**—The act of March 2, 1919 being remedial, should be liberally construed.
2. **TIME LIMIT FOR FILING CLAIMS.**—The last day for filing claims under the act of March 2, 1919, to wit, June 29, 1919, falling on Sunday, the succeeding day, or June 30, became the last day for filing claims within the meaning of said Act.
3. **DEPOSIT IN THE UNITED STATES MAIL SUFFICIENT.**—Where the claimant deposited his claim in the United States mail on the last day for filing, addressed to the proper tribunal, such claim should be deemed filed on said day within the provisions of the act of March 2, 1919.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Office of the Director of Purchase, dated October 6, 1919, on contract GSC-1177-J, presented as a class A claim, under the following circumstances. This claimant mailed its claim to said Claims Board and it was received by the said Board on July 2, 1919, and marked "Received by Jas. O. Tripp, Recorder, date 2d day of July, 1919. *As of 1st H. D.*" In response to the said Claims Board's inquiry the claimant replied on September 22, 1919, "We did not file our claim for band instruments on contract GSC-1177-J, C165, prior to June 30, 1919."

2. The Claims Board thereupon denied the claim on the ground that no agreement was made within Section 1 of the act of March 2, 1919, and wrote the claimant that the reason for the denial was that the claim was not filed prior to June 30, 1919, and that the claimant could appeal to this Board.

3. The statement of claim was verified by the claimant on June 30, 1919, before a notary. The claimant introduced at the hearing on January 14, 1920, the affidavit of Hugh E. White, vice president of the claimant, which reads in part:

"Statement of claim was verified by * * * Hugh E. White, June 30, 1919, before George H. Lenz, notary public, and after sworn to, was put in the mail between the hours of 6 and 7 p. m. of the above date."

At the hearing Col. William A. McAdam and Recorder James O. Tripp, of the Claims Board, Director of Purchase, testified that the notation on the statement of claim "Received by Jas. O. Tripp, Recorder, date 2d day of July, 1919. As of 1st H. D.," means that the wrapper or envelope on said statement of claim was postmarked in Cleveland "July 1, 1919," and was received in Washington on July 2, 1919.

4. We find from the evidence the statement of claim was deposited in the mail in Cleveland, Ohio, on June 30, 1919, was postmarked in Cleveland, Ohio, on July 1, 1919, and was received by the Claims Board, Director of Purchase, on July 2, 1919.

DECISION.

1. The Attorney General of the United States has held in his opinion dated October 10, 1919, that the following words in the act of March 2, 1919: "That this act shall not authorize payment to be made of any claim not presented before June 30, 1919," should be liberally construed, in view of the fact that the act is remedial; and as June 29, 1919, the last day for the presentation of claims, fell on Sunday, that fact "calls for the application of the rule that when the last day within which a deed is to be performed falls on Sunday that day is to be excluded, and the act may be done upon the succeeding day. *Monroe Cattle Co. v. Becker*, 147 U. S. 47; *Street v. United States* 133 U. S. 299-306. *Pressed Steel Car Co. v. Eastern Ry. Co.*, 121 Fed. 609; *Hammond v. American Life Ins. Co.*, 10 Gray 306," and that, therefore, under the said act proper claims presented on June 30, 1919, may be considered and allowed. The Attorney General also states in the said opinion of October 10, 1919: The act "does not provide how or to what official or department they (the claims) should be presented. In the absence of such provision presentation of such claims in good faith to the Railroad Administration or to the Auditor for the Navy Department on or before June 30, 1919, would be sufficient."

2. On June 30, 1919, the War Department Claims Board issued the following ruling:

"The War Department Claims Board rules that where it is shown that the contractor has deposited papers *in the United States mails prior* to June 30, 1919, his claim may be accepted and shall be considered as being in compliance with the provisions of the act approved March 2, 1919."

3. On October 17, 1919, the War Department Claims Board passed the following resolution:

"Resolved that claims presented to the Secretary of War *on June 30, 1919*, shall be considered properly presented under the provisions of the act of March 2, 1919."

4. As the written claim herein was placed in the United States mail on June 30, 1919, it follows, under the said opinion, ruling, and resolution, that the claim was properly presented to the Secretary of War within the provisions of the act of March 2, 1919.

5. The decision of the Claims Board, Office of Director of Purchase, is hereby reversed.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield and Mr. Shirk concurring.

Case No. 165.

In re CLAIM OF ENTERPRISE STAMPING CO.

1. **PREPARATION TO PERFORM CONTRACT.**—Where claimant was instructed by an authorized agent of the Government to proceed at once to acquire the necessary facilities for performing a Government contract and was told that it would be recommended for a contract, and claimant, pursuant to said instructions, did make preparations, there is an implied agreement on the part of the Government to reimburse claimant for the amount so expended.
2. **CLAIM AND DECISION.**—Claim is made for \$2,419.74, expended in preparing to perform a Government contract for hard-bread cans, pursuant to the instructions from an authorized Government agent, under the act of March 2, 1919. Held, claimant is entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage & Traffic Division Supply Circular No. 17, 1919, for \$2,419.78, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In September, 1918, the United States Government was in great need of hard-bread tins for the packing of hard-bread to be shipped overseas.

3. On September 3, 1918, the Acting Quartermaster General forwarded to the Enterprise Stamping Co. at McKees Rocks, Pa., a letter which set out, among other things, the following:

* * * * *

"2. It is desired that you inform this office at your earliest convenience whether you are in a position to make a quantity of these tins, either by hand or machinery.

"3. If you anticipate difficulty in securing deliveries of tinsplate, you can be assured that this department will be able to cause to be furnished a quantity sufficient for your needs for Government work."

* * * * *

"By authority of the Acting Quartermaster General:

"H. E. WILKINS,
"Colonel, Quartermaster Corps,
"In Charge, Subsistence Division.
"By GEO. J. LACE,
"First Lieutenant, Quartermaster Corps."

4. On September 5 claimant company, by W. M. McGhee, acknowledged receipt of the letter of the Quartermaster General of September 3, and on September 7 again wrote the Quartermaster General, stating that Mr. J. A. McGhee would handle the matter of the making of hard-bread tins upon his return to McKees Rocks.

5. On September 10, 1918, the Quartermaster General wrote claimant as follows:

"1. Your letters of September 5 and 7 are acknowledged.

"2. Letter has this day gone forward to the depot quartermaster, New York, stating that you may be in position to manufacture cans for hard-bread.

"3. *It is requested that you kindly carry on negotiations direct with the depot quartermaster, New York, and as soon as you have had time to go over the proposition carefully, and after you decide to make cans for hard-bread, that you render proposals showing daily production and price; also give earliest possible date when production will commence.*

"By authority of the Acting Quartermaster General.

"H. E. WILKINS,

"Colonel, Quartermaster Corps, in charge Subsistence Division.

"By: GEO. J. LACE,

"First Lieutenant, Quartermaster Corps."

6. Thereafter, on September 16, Mr. J. A. McGhee, president of the Enterprise Stamping Co., called on Lieut. David E. Graham, Quartermaster Corps, Subsistence Division, and had a conversation with him. It was in this conversation that claimant alleges that a contract was entered into between it and the United States Government, acting through Lieut. David E. Graham, Quartermaster Corps, for the manufacture of 2,000,000 tins for the packing of hard-bread.

7. On September 17, 1918, claimant wrote the Quartermaster General, attention Lieut. D. E. Graham, as follows:

"Quartermaster General,

H. E. WILKINS,

Colonel, Q. M. Division, Washington, D. C.

Attn. Lieut. D. E. Graham.

"DEAR SIR: Referring to conversation had with you Sept. 16th in regard to hard-bread cans, we are pleased to confirm the price of \$51.00 per thousand f. o. b. our works, McKees Rocks, Pa. Or, if delivery is to be made to Pittsburgh bakers, we agree to truck the same free of charge within the city limits; terms net cash.

"This price is based on the present price of tin plate \$7.75 per base cost and should there be any advance in the same to materially affect our cost during the life of our contract, then the price of hard-bread cans would be advanced sufficiently to take care of such advance. Likewise, should there be any reduction in tin plate, a corresponding allowance would be made to you.

"We believe we can get our line in shape to commence shipping November 1st, possibly sooner, and take care of 2,000,000 cans dur-

ing the three months of Nov., Dec., and Jan. We would also agree to take care of as many more cans as our line could produce.

"If you can see your way clear to favor us with a contract immediately, it would place us in a much better position to get what tools we require as well as our tin plate more promptly. Assuring you our efforts will be exerted to expedite any orders you favor us with, we are,

"Yours, truly,

(Signed)

"ENTERPRISE STAMPING COMPANY.

"JNO. A. MCGHEE,

"President."

8. And again, on October 3, 1918, claimant wrote the Quartermaster General, attention Lieut. D. E. Graham, as follows:

"Quartermaster General,

"H. E. Wilkins,

"Colonel, Q. M. Division, Washington, D. C.

"Att'n. Lieut. D. E. Graham.

"Gentlemen: Referring to conversation had with you on Sept. 17th, as well as our letter of that date quoting you on two million hard-bread cans, at that time you instructed the writer to proceed with our arrangements to get ready to make these cans as quickly as possible, and we expect delivery of our dies and what other tools we need about Oct. 15th, and if our tin plate arrives in time we will be ready to produce cans not later than Nov. 1st. Up to this time we have not had an acknowledgment of your department's acceptance of our quotation, and we would be glad to have you send us a formal acceptance by return mail, and oblige,

"Yours, very truly,

(Signed)

"ENTERPRISING STAMPING CO.,

"J. A. MCGHEE,

"President."

9. Again, on October 22, 1918, claimant wrote the Quartermaster General, attention Lieut. D. E. Graham, as follows:

"Again referring to our conversation of Sept. 16th * * *

"Our line for the hard-bread cans is practically complete and we have already received part of our tin plate to take care of these cans in accordance with our letter to you of Sept. 17th.

"Can you at this time give us any definite information as to when you will be in a position to favor us with orders for hard-bread cans? We would certainly very much appreciate any information you can give us along this line, as it will enable us to make our plans accordingly."

10. Claimant states in its statement of claim, Form B:

"1. That during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, and on or about the 16th day of September, 1918, the claimant entered into an agreement with an officer or agent acting under the authority, direction, or instruction of the Secretary of War (President of the United States), for 2,000,000 hard-bread cans, delivered Pitts-

burg district, at \$51 per thousand. Deliveries to start Nov. 1st, or sooner, and continuing for three months."

11. The claim herein is for machinery facilities provided by claimant for the carrying out of its alleged contract for 2,000,000 hard-bread cans, as said by the claimant, "the above machines and labor in preparation for manufacture of hard-bread cans."

12. The claimant's case, as stated by the Government attorney (see transcript of evidence Dec. 15, 1919, p. 2), is as follows:

"The Enterprise Stamping Co. alleges that its representative, Mr. John A. McGhee, was verbally instructed by Capt. Graham to equip his plant as quickly as possible for the manufacture of hard-bread cans which were to be delivered in the Pittsburgh district; and that as soon as the plant was equipped the company was to receive a contract for two million hard-bread cans, \$51 per thousand. It is therefore alleged that pursuant to these instructions special facilities were purchased at a cost of \$2,419.78."

13. The testimony of Mr. McGhee is to the effect that he was instructed by Lieut. David E. Graham to equip his factory forthwith for the manufacture of hard-bread cans, of which there was a most urgent need. These instructions were issued on September 16 or 17, 1918. In the claimant's letter to the Quartermaster General, dated October 3, 1919, quoting paragraph 8, the claimant writes:

"Referring to conversation had with you on Sept. 17th as well as our letter of that date quoting you on two million hard-bread cans, at that time you instructed the writer to proceed with our arrangements to get ready to make these cans as quickly as possible."

14. Lieut. Graham testified that during the fall of 1918 he was a lieutenant in the Subsistence Division of the Quartermaster Corps, and that his immediate superior was Col. J. W. McIntosh; that he was in charge of the production of hard-bread tins for hard-bread emergency rations, etc., and that his instructions from his superior were to "increase unlimited preparations (for the production of hard-bread and tins for hard-bread) by any means possible," and that "instructions were always to the effect to get all possible production of hard-bread tins and cartons regardless of how it was done," and that he "was told to see that this production was increased as rapidly as possible, and see that the manufacturers of hard-bread put in the necessary equipment and that the tin manufacturers put in the necessary equipment immediately."

15. Lieut. Graham further testified that "It developed that he (the claimant) was in position to equip his plant and that he (the claimant) was instructed to equip his plant for the manufacture of hard-bread tins"; that he was not clear as to whether or not he furnished the claimant a contract for 2,000,000 tins, and that "I would not be willing to commit myself on the quantity either way. I knew

he (the claimant) was promised that he would get a contract." Lieut. Graham's testimony on pages 21 and 22 of the transcript of testimony, December 16, 1919, is as follows:

"Q. You testified here a few minutes ago you had no authority to give any contracts.

"Mr. GRAHAM. I had no authority to give any written contracts, as a contracting officer, sign any contracts; no.

"Q. Nor to negotiate any contracts?

"Mr. GRAHAM. Oh, I had authority to negotiate contracts, surely.

"Q. But then it had—you understood it had to go through the Board of Review and all the rest of the personnel afterwards, in order for the contract to issue?

"Mr. GRAHAM. We understood that that was the substance of the original Notice 28, but there were so many amendments to Notice 28 we finally became very much confused and hazy about it, so we forgot it entirely.

"Q. In other words, the orders of superior officers were absolutely disregarded in the office of the Quartermaster General?

"Mr. GRAHAM. I would say so; yes.

"Q. You had instructions and directions from your superior officer as to how to proceed with reference to getting goods, didn't you?

"Mr. GRAHAM. To get hard bread at any cost, sir, regardless of how it could be gotten. We thought more of the soldiers and the conditions of the boys in France than we did of Form 28, or any other so-called red tape which tied up things and prohibited our getting supplies to France.

"Q. In other words, you as a lieutenant at that time in the Army, knew more about the conditions in France than the Quartermaster General of the Army?

"Mr. GRAHAM. I knew more apparently of how Form 28 would function in supplying the needs of the Army in France than the Quartermaster General; I will say that.

"Q. Did you in fact ever give to this claimant company any directions to go ahead as soon as he could with the manufacture of tins?

"Mr. GRAHAM. Yes; he was told to equip and get started.

"Q. Was told to go ahead and manufacture tin cans?

"Mr. GRAHAM. Yes.

"Q. It was your intention to make a contract with him?

"Mr. GRAHAM. Positively."

"Q. Whether you had any authority, or not?

"Mr. GRAHAM. Yes.

"Q. Whether you had instructions or directions to do so?

"Mr. GRAHAM. I had instructions and authority, as I understood, to get the hard bread at any cost."

DECISION.

1. The present case is as nearly on all fours with the case of the Heekin Can Co., case No. 70, decided by this board and reported in volume 1, part II, p. 328, decisions of the War Department Board of Contract Adjustment, as it is possible for two cases to be. With the

exception of the names, the price, and the dates, the two cases might be considered as exactly alike.

2. As is said in the Heekin Can case, *supra*,

"The question for this Board to decide is whether or not an oral contract was made by Lieut. Graham of the subsistence division of the Quartermaster General's office, with claimant, Heekin Can Co. (Enterprise Stamping Company), for the manufacture of 2,000,000 hard-bread cans by automatic machinery."

3. We can go on and adopt the language of that case further, with a few necessary changes, as follows:

According to the evidence claimant had an interview with Lieut. Graham on or about September 16, and during this interview was informed that he would receive an order for 2,000,000 hard-bread containers to be manufactured by machinery. Claimant, it appears, proceeded at once to install the machinery to manufacture the hard-bread containers automatically.

4. In the letter of September 10, 1918, and before this conversation, claimant had been notified as follows:

"It is requested that you kindly carry on negotiations direct with the Depot Quartermaster, New York."

5. Notwithstanding this letter, claimant contends that he was not told in the conversation at the time that the alleged contract for the 2,000,000 cans arose, that the contract would have to come through the Depot Quartermaster at New York. (Tr. p. 8, Dec. 15, 1919.)

"Q. Did Lieut. Graham advise you at that time that the contract would come from the zone office?

"Mr. McGHEE. My recollection is that he said it would come from the Subsistence Department at Washington. I do not remember anything about the zone office."

"Q. You do not remember of his telling you that any written contract which you would receive would come from the contracting officer in your particular zone?

"Mr. McGHEE. No; he did not."

"Q. You said he promised you an order for 2,000,000 cans?

"Mr. McGHEE. Yes; and he said they would get as many more as we could produce."

* * * * *

"Q. Did he state that he would give you a contract, or he would recommend a contract for so much?

"Mr. McGHEE. No, sir. He said they would prepare a contract, that it would come through the department and it would take possibly a week or 10 days. I am very positive about that, and Mr. Landon, who was a party to the conversation, will verify that conversation. He was very close to Lieut. Graham and went around with the lieutenant a great deal to different plants to help secure deliveries, etc."

6. Lieut. David E. Graham testified as follows (Tr. p. 20, Dec. 16, 1919):

"Q. You would not be willing to say you did not do it?

"Mr. GRAHAM. No, sir; I would not be willing to commit myself on the quantity either way. I know he was promised he would get a contract.

"Q. He was also told you had no power to give him a contract?

"Mr. GRAHAM. No; he was told that definite arrangements for the contract would be made by the Zone supply officer."

7. During the period when this alleged contract is claimed to have been entered into, Circular 28, or, as it is officially known, General Notice No. 28, Quartermaster General's Department, dated July 18, 1918, was in operation. That notice, in part, reads as follows:

"All contracts made by purchasing officer wherein the total contract price is in excess of twenty-five thousand dollars (\$25,000) * * * must first be approved by the Director of Quartermaster Purchases after review and recommendation by the Board of Review before such contract shall be in full force and effect."

8. In his testimony Lieut. Graham says, with regard to this circular (Tr. p. 20, Dec. 16):

"Q. You were familiar with Circular 28 Q. M. General?

"Mr. GRAHAM. Yes; very familiar with it.

"Q. And you knew you could not give any contract for any amount in excess of \$25,000.

"Mr. GRAHAM. Colonel, if you will pardon me, I have a very peculiar feeling with regard to Circular 28. We all considered that a very huge joke, as a matter of fact, in the Quartermaster's Department. It was amended from time to time, and I don't believe that Circular 28 ever operated with any degree of efficiency in the Subsistence Division; in fact, we practically ignored it."

9. It will be noted that he said, "It was amended from time to time." It would seem that General Notice No. 28 was amended but once before its cancellation by General Notice No. 189 on October 8, 1918, and that amendment was by General Notice No. 72 of date August 13, 1918, and applied only to allotments made by the Food Administration to the Quartermaster Department.

10. As the alleged contract herein is largely in excess of the sum of \$25,000, and as this provision of the circular was known to Lieut. Graham, it is seen that at the time of the making of the alleged contract for the purchase by the Government of 2,000,000 hard bread cans, Lieut. Graham had absolutely no express authority to make same on behalf of the Government. Under the provisions of the notice above quoted, no officer of the War Department had authority to consummate a contract for the Quartermaster General's Department involving a larger amount than \$25,000, since this was

the sole province of the Director of Quartermaster Purchases on recommendation of the Board of Review named in the notice.

11. The claimant company was notified in writing by the Quartermaster General's office that its dealings must be through the depot quartermaster at New York (letter of Sept. 10, 1918). This was before the alleged contract with Lieut. Graham, and was sufficient to put claimant on notice that its dealings for a contract must be with an officer other than Lieut. Graham, who was stationed in Washington.

12. While this case is, as said originally, on all fours with the Heekin Can Co. case, denial of relief would have to follow as in that case. The Heekin Can Co. decision was, however, overruled by the Secretary of War on December 26, 1919.

13. This case, we think, can be decided upon another point, and as this other branch of the case is substantially identical with the New Orleans Can Co. case (vol. 1, Pt. II, p. 163, Decisions of the Board of Contract Adjustment), it will be further considered along that line.

14. The question, therefore, is as to whether or not an implied agreement was entered into between the claimant and the Government on or about September 16 or 17, 1918, arising out of the fact that Lieut. Graham directed the claimant to equip itself with the necessary machinery for the manufacture of tin cans for hard-bread.

15. The evidence both of the claimant and of Lieut. Graham is to the effect that the claimant was instructed to procure the necessary equipment for the manufacture of hard-bread tins, and that the claimant obeyed the instructions of the Government officer and purchased and installed the necessary equipment, and its claim is based on the loss accruing to it by its compliance with the directions of Lieut. Graham.

16. Although it was not within the scope of Lieut. Graham's duties to enter into a written contract formally executed in the manner prescribed by law, yet it was his duty to see to it that the production of hard-bread cans be greatly increased to meet the urgent need, and in directing this claimant to equip its mills for the production of hard-bread tins he was acting within the scope of his duty. In so doing he had express instructions from his superior officer, Col. McIntosh, and it appears from Lieut. Graham's testimony that he issued such directions in many instances and his directions were obeyed.

17. On these facts, it is the duty of the Government, under the act of March 2, 1919, to give a contractor relief for such losses as it has suffered by compliance with directions of a Government officer under the circumstances stated. An implied agreement arose on September 16 or 17, 1918, by which the claimant undertook to equip

its mills with machinery for the manufacture of hard-bread tins, and the Government undertook to reimburse the claimant for any loss that it might suffer by its compliance with the directions of Lieut. Graham.

DISPOSITION.

1. This board will make and transmit a document setting forth the nature, terms, and conditions of the agreement, and certificate Form C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage & Traffic Division.

Col. Delafield, Lieut. Col. Junkin, and Mr. Eaton concurring.

Case No. 1264.

***In re* CLAIM OF TROY LAUNDRY MACHINERY CO., LTD.**

1. **CONTRACT—ORAL.**—Where the Government through an officer of the War Department entered into an oral agreement, under the terms of which claimant was to furnish certain articles to the Government, and claimant delivered such articles and the Government accepted same, the Government is liable for the price agreed to be paid.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 for \$9,778, the purchase price of certain laundry machinery which it is alleged the claimant agreed to furnish and the Government agreed to purchase f. o. b. Chicago, Ill., and Boston, Mass., under a contract entered into with Lieut. Robert W. Weeks, Chemical Warfare Service, United States Army, on or about July 25, 1918; and also for \$43.52 freight charges prepaid by the claimant on some of the material delivered to the Government.

2. Under date of July 24, 1918, a procurement request was prepared by Maj. George F. Felker, of the Chemical Section, Edgewood Arsenal, asking the contracting authority to issue an order to the claimant for certain specified laundry equipment to cost \$9,778 f. o. b. Chicago, Ill.

3. On July 25, 1918, Lieut. Robert W. Weeks, Chemical Warfare Service, verbally instructed the claimant through its representative, Mr. G. H. Child, to furnish the Government the laundry machinery above referred to and agreed on behalf of the Government to pay therefor \$9,778 plus freight from shipping point.

4. Under date of July 29, the claimant addressed a letter to Edgewood Arsenal, reading in part as follows:

"Our representative, Mr. G. H. Child, telephones us an order for the following laundry equipment:

Item No. 1.—2 42 by 36 inch style M-1 one pocket Henrici metal washers with tolin bronze cylinder and planer type vertical motors wound for service 220 volts, 3 phase, 60 cycles, alternating current ----- \$3,600.00

Item No. 2.—2 30-inch solid curb extractors, equipped with type C cover, gravity brake and 220 volt, 2 phase, 60 cycles, alternating current, horizontal motor attached with push-button starter-----	\$1, 530. 00
Item No. 3.—1 troy soap saving system complete with two tanks, stand, bracket and boil pipe-----	110. 00
Item No. 4.—2 42 by 60 inch hot-air reversing type dry-room tumblers with 2-M mesh galvanized woven wire cylinders, having one door, no partition, type A drive, A-1 reversing two motors wound for 220 volts, 3 phase, 60 cycles-----	4, 090. 00
Item No. 5.—16 32 by 22 by 25 inch troy metal truck tubs with wood drain board and draw-off cock-----	448. 00
	<hr/> 9, 778. 00

"The above prices are f. o. b. cars our factory at Chicago, Ill., and Boston, Mass.

"We understand that you will send us formal order confirming your instructions to Mr. Child, and we trust this will be forthcoming in early mail, as we are anxious to receive the shipping instructions in order that we may send same to the factory."

5. This letter was acknowledged by Edgewood Arsenal, but on account of the supply of material of this type having been transferred to the Construction Division of the Army, no written procurement order was issued to the claimant prior to the armistice.

6. The equipment ordered as above has been delivered to the Edgewood Arsenal and accepted by the Government.

DECISION.

1. The facts in the case establish the existence of an oral agreement under which the claimant agreed to sell and the Government agreed to purchase and to pay for the laundry machinery covered by this claim, and the claimant is entitled to be paid the agreed price therefor.

DISPOSITION.

1. This Board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate officer for payment.

Col. Delafield, Mr. Patterson, and Mr. McCandless concurring.

Case No. 2349.

In re CLAIM OF BLUFF CITY GRAIN CO.

1. **INTEREST ON HOLDING OATS.**—Where deliveries of oats formerly contracted for are suspended for six weeks, there being no agreement that the Government should pay interest during the time of such suspension, there is no liability on the part of the Government to pay interest.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$580.06, interest, because delivery of oats formerly contracted for was delayed by the Government for six weeks. Held, claimant is not entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board, Office of the Director of Purchase, on a claim for interest amounting to \$580.06 alleged to be due on account of two informally executed contracts under the following circumstances:

2. On or about October 21, 1918, the Forage Branch, Fuel and Forage Division, Office of the Quartermaster General, Chicago, Ill, sent claimant purchase orders Nos. B-02627 and B-02672, each for 50,000 bushels of No. 3 white oats at 81½ cents per bushel to be delivered at the rate of two cars per day to Sub-Depot Quartermaster, Camp Beauregard, La. Each of the said purchase orders contained the following instructions, marked "Important":

"1. *The number of this order* must appear on each invoice and bill of lading, and on all correspondence pertaining to this contract.

"2. Sight drafts may be drawn for 100 per cent: (A) When supported by public warehouse receipt; (B) When supported by Government bills of lading.

"3. If shipments move on commercial bills of lading, drafts for 95 per cent of invoice value may be drawn when accompanied by bills of lading in triplicate, original and two copies.

"4. Invoices and inspections and weight certificates must in all cases be furnished in duplicate. Invoices should be certified as follows: 'I hereby certify that the above account is correct and payment therefor not received.' Title or authority for signing must be indicated.

"5. If contractor elects not to draw draft, prompt payment will be made direct upon receipt of invoices properly supported."

3. By letter of October 23, 1918, the Chief of the Forage Branch, Office of the Quartermaster General, Chicago, Ill., notified the claimant as follows:

"1. Reference our purchase of October 21st, sack and ship 100,000 bushels No. 3 white oats to Camp Quartermaster, Camp Beauregard, La.

"2. This will be known as shipping order SOB-1473 and contract B-02627 of this office.

"3. Ship on straight form commercial bills of lading, same to be plainly marked 'To be converted into Government bills of lading at destination.'

"4. Start shipments immediately and continue at the rate of two cars per day until completed.

"5. In making this shipment you are authorized to use 20,000 of the single five-bushel sacks which you have on hand for our account."

On November 30, 1918, the Chief of the Forage Branch sent the following telegram to claimant:

"Stop immediately all shipments of oats on orders of this office Confirm."

4. At the time of receiving the telegram of November 30 the claimant had already shipped 13,115 bushels of oats under the two purchase orders, leaving a balance of 86,885 bushels as the balance of the quantity covered by said purchase orders.

By letter of December 23, 1918, the Chief of the Forage Branch, Subsistence Division, Office of the Director of Purchase, directed the claimant to ship the remainder of the oats under the said purchase orders, namely, 86,885 bushels (bulk), to the Wheat Export Co., care of the British Ministry of Shipping, New Orleans, La., for export. The claimant alleges in its petition that it did not receive instructions and permit for this shipment until December 29, 1918. These oats were shipped according to the instructions and paid for at the price agreed upon, and so there is no claim for the value of the oats covered by said purchase orders.

5. The basis of claim is for interest on \$71,028.48 at 6 per cent for 49 days, amounting to \$580.06, being the interest on the value of 86,885 bushels of oats at 81½ cents per bushel, which oats were held up from shipment on instructions of the Government from November 11, 1918, to December 30, 1918, a period of 49 days.

DECISION.

1. The claimant contends that it has been damaged to the extent of \$580.06 on account of loss of interest at 6 per cent on \$71,028.48, being the value of oats undelivered by claimant under two purchase orders from the Government from November 11, 1918, when it was

ordered to hold up further shipments of oats, until December 30, 1918, when claimant received instructions to ship the balance of said oats aggregating 86,885 bushels.

2. Neither the purchase orders by which the Government contracted to purchase said oats, nor any other contract or agreement with the Government stipulated that the Government should pay interest. As a general rule, interest is not allowable on claims against the Government unless it is stipulated in the contract or expressly given by statute. Section 1168 of the Compiled Statutes of 1916 provides:

“No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.”

In *National Home v. Parrish* (229 U. S. 494) it was held:

“Generally, interest is not allowable on claims against the Government unless it has stipulated to pay it or is given by statute.”

(See also 17 Ops. Atty. Gen., 315; *Scully v. U. S.*, 197 Fed., 327; *Myerle v. U. S.*, Ct. Cl., 105; *Axman v. U. S.*, 47 Ct. Cl., 553; *McLachlan & Co. v. U. S.*, 36 Ct. Cl., 186; *Claim J. B. Williams Co.*, 1 Dec. Bd. Cont. Adj., 225; *Claim Lehigh Machine Co.*, 1 Dec. Bd. Cont. Adj., 150.)

3. Neither the contracts under which the Government agreed to purchase the oats from the claimant nor any statute authorizes the allowance of interest on the value of the oats remaining undelivered by the claimant from the time it was requested to hold up deliveries until it received orders to ship the balance of the oats to the British Ministry of Shipping. It, therefore, follows that the allowance of interest is not authorized. The relief prayed for is, therefore, denied.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 1254.

In re CLAIM OF SIMPLE SIMON MANUFACTURING CO.

1. **RECOMMENDATION OF AWARD OF CONTRACT.**—Where a contractor engaged exclusively in Government work is informed by a procurement officer that it had been recommended for another contract, but is advised to do nothing until it should receive the contract, but, relying upon the advice of another officer who, however, had no contracting authority, maintained its organization and equipment in readiness for the expected contract which was never awarded, the contractor is not entitled to reimbursement under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for reimbursement of expenses incurred in maintenance of organization in expectation of receiving a contract for white duck coats and trousers. Held, claimant is not entitled to relief.

Mr. Patterson writing the opinion of the Board.

FINDINGS AND DECISION.

This claim arises under the act of March 2, 1919. Statement of claim, Form A, for \$15,240 has been filed with the Claims Board, Office of the Director of Purchase. Said Board having determined said claim adversely to the claimant, appeal was taken to this Board June 30, 1919.

As presented before this Board, the claim falls under class B and is for expenses incurred in maintaining its organization and equipment in readiness for the performance of a contract which, as it contends, was promised it but which it never received.

FINDING OF FACT.

The Board finds the following to be the facts:

I.

In the month of October, 1918, and at the subsequent times herein after mentioned, claimant, the Simple Simon Manufacturing Co., was a copartnership engaged in the manufacture of children's clothing, at Philadelphia, Pa. B. F. Taylor was one of the partners. John Wiechers was a civilian employee of the War Department, assigned to the office of Quartermaster General in New York City, as procurement man on denim overalls, coats, and white ducks, chief of the inspection branch of the white goods section, and chief of the

specifications branch of the manufacturing section. William Brooks was a captain in the Quartermaster Corps and had charge of the Uniforms Branch, Clothing and Equipage Division, Zone Supply Office, Philadelphia, Pa. Neither Mr. Wiechers nor Capt. Brooks was a contracting officer.

Capt. Brooks, prior to entering the military service of the United States, had been for many years engaged in the clothing business in Philadelphia, was well acquainted with all the clothing manufacturers of that city, and their facilities for performing Government contracts. He was frequently consulted by Mr. Wiechers relative to orders placed or the placing of which was contemplated with clothing manufacturers in Philadelphia, and his advice was uniformly relied upon.

II.

At some time in the month of January, 1918, claimant abandoned its regular work and devoted itself entirely to Government contracts until December 3, 1918. During this period it received in all three contracts: Two for blue denim fatigue uniforms and one for white duck clothing. These contracts were performed by it in a manner generally satisfactory to the Government. Each of these contracts was negotiated by Mr. Taylor on behalf of claimant with Mr. Wiechers. It does not appear that Mr. Taylor pursued any inquiry as to the scope of Mr. Wiechers' duties or the extent of his authority, knowing him merely as "a representative of the Government." On each occasion he made his arrangements to begin work upon Mr. Wiechers' statement that his bid had been approved, giving the bond which was required as a prerequisite to his receiving from the Government the fabric of which the articles were to be made, and entering upon their manufacture without awaiting the formal contract, which, in each of the three instances, followed two or three weeks later.

III.

On or about October 16, 1918, Mr. Taylor had an interview with Mr. Wiechers at the latter's office in New York City in which the question of another contract for white goods between the claimant and the Government was discussed. Mr. Wiechers informed Mr. Taylor that claimant had been recommended for another contract and there was some discussion about the quantity. It was Mr. Wiechers' custom at this time to inform all contractors that there had been a change in the routine respecting the awarding of contracts in his branch and that his action was merely a recommendation which had to be accepted by the Board of Awards and then referred to a Board of Review in Washington; and to advise such contractor to wait until he received a contract.

IV.

Shortly after Mr. Taylor's interview with Mr. Wiechers, referred to in the last previous finding, Mr. Taylor had an interview with Capt. Brooks aforesaid, at the latter's office in Philadelphia, in which he informed Capt. Brooks of said interview and stated that Mr. Wiechers had told him that he had been recommended for a contract for 30,000 white duck coats and trousers and asked Capt. Brooks' advice as to what he should do. Capt. Brooks replied in substance:

"If Mr. Wiechers has told you that you are recommended for 30,000 white duck coats and trousers, I would advise you to promptly get ready to execute that contract, because when it comes through, we will insist on you fulfilling the requirements of the contract and will not stand for any delinquencies."

V.

Thereafter Mr. Taylor called upon or telephoned Capt. Brooks about every other day in reference to the expected contract until November 26, when Capt. Brooks notified him to give up all expectation of ever receiving a contract and to resume his civilian work at the earliest possible moment. Claimant acted promptly in accordance with said notification and on December 3 was in condition to take up work of the character of that in which it had been engaged prior to its entry upon work for the War Department.

VI.

During the period between the date of Mr. Taylor's interview with Mr. Wiechers, set forth in Finding III, above, and the date of the receipt of notification from Capt. Brooks, referred to in the last preceding finding, claimant maintained its organization and equipment for the performance of the expected contract at an expense of \$115 a week for rent and salary of its factory foreman.

CONCLUSION.

While Mr. Wiechers would not swear specifically that he informed Mr. Taylor that his action upon claimant's bid was advisory merely and had no contractual force, the Board is constrained to the conclusion that all the probabilities point to his having done so. His recollection is clear that he never told anyone that he had any power to make a contract, and Mr. Taylor admits that Mr. Wiechers informed him of the change in the routine of awarding contracts by reason of which, to quote Mr. Wiecher's language: "my powers have been shorn." That Mr. Taylor had some doubt in his own mind as to whether he had a contract or not, is indicated by the fact of his

calling immediately upon Capt. Brooks—the latter says that Mr. Taylor stated to him he had seen Mr. Wiechers on the previous day. Capt. Brooks further testified that at a subsequent interview with Mr. Taylor he informed the latter that he (Capt. Brooks) had received a letter of notification from the New York office that a contract had been awarded and for him (Taylor) “to sit tight till it came through.”

This testimony might be controlling in deciding the case if it were not for the fact that Capt. Brooks apparently never received any such letter, although he testified in considerable detail as to its contents and as to the fact that it was customary to send such a letter whenever a contract was recommended. He promised to supply it from his files, but after some delay informed the Board in writing, under date of December 30, 1919, that a search of the files in the Quartermaster Department in Philadelphia had failed to disclose any such communication and that, therefore, it was very possible he had been mistaken and had confused this case with some other case. A further search of the files of the New York office, Light Goods Section, Clothing and Equipage Division, now in Washington, failed to show any such letter was ever dispatched.

After a careful consideration of the file and of the testimony, therefore, this Board reaches the conclusion that claimant has failed to establish by a preponderance of evidence that any agreement within the purview of the act of March 2, 1919, was made between it and any officer acting under the authority, direction or instruction of the Secretary of War, and relief must therefore be denied.

DECISION AND DISPOSITION.

This Board will enter a final order in the usual form, denying relief.

Col. Delafield and Lieut. Col. Junkin concurring.

Case No. 1804.

In re CLAIM OF BAUSCH & LOMB OPTICAL CO.

1. **AGREEMENT IMPLIED FROM ACCEPTANCE.**—Where the Government orders sample telescopes prior to November 12, 1918, and accepts delivery without having fixed any price, there is an implied agreement such as will entitle the manufacturer to relief under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for expenses incurred in the manufacture of two experimental observation telescopes ordered and accepted by the Government. Held, claimant is entitled to relief.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$1,967.46, by reason of an agreement alleged to have been entered into between the claimant and the United States. The claim was originally filed with the Ordnance Claims Board, and was forwarded on August 12, 1919, to this Board on the ground that it is a class B claim.

2. In August, 1918, the engineering division of the Ordnance Department at a conference decided to have the claimant make samples of observation telescopes, to be used in determining the designs of a large number which the Government was preparing to order.

3. As instructed at said conference in August, 1918, Lieut. Maurice P. Anderson went to the claimant's establishment in Rochester, N. Y., and orally requested the claimant to proceed with work on two experimental telescopes described by him without waiting for a formal order. On August 28, 1918, Mr. Anderson wrote the claimant as follows:

"It is understood that you are about to forward 3 sample observation telescopes to Washington for the inspection of the engineering division, and that you will submit a price on the samples to this office in order that you may be reimbursed."

In accordance with Mr. Anderson's request the claimant manufactured a 2-inch telescope and a 3-inch telescope and delivered them,

together with a third telescope, which it took from stock, to Capt. Wiley, of the engineering division. The said third telescope was returned to claimant. The claimant has withdrawn its claim for the third telescope.

4. No price was fixed on the 2-inch telescope and the 3-inch telescope, which were delivered and accepted by the Government.

DECISION.

1. The request by Maurice P. Anderson that the claimant manufacture the 2-inch telescope and the 3-inch telescope, the performance of said work by the claimants, and the delivery of the said telescopes and acceptance thereof by the Government, constitute an implied agreement, and the obligation arises on the part of the Government to pay the claimant the necessary costs of said work plus a reasonable profit.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Ordnance Claims Board for appropriate action.

RECOMMENDATION.

An examination of the supplemental contract, cancelling and settling War Ordnance P16617-1218C, contract with the claimant, dated October 17, 1918, for 3,000 telescopes at \$225 each, under which claimant received \$42,116.99 for amortization of special facilities, etc., should be made to determine whether said settlement covers any part of "overhead," "drawings," and "patterns" asked for in this claim.

Col. Delafield and Mr. Eaton concurring.

Case No. 56.

In re **CLAIM OF OLIVER IRON & STEEL CO.**

1. **MEETING OF THE MINDS.**—Where the Government asks for bids on pick mattocks in accordance with blue print B-7, and claimant submitted a bid according to its own blue print No. 25-101, and the Government wrote claimant that recommendation for a contract had been made according to Government blue print B-7, and claimant wrote back that it had changed the specifications to its own blue print No. 25-101, to which letter the Government did not reply, and claimant immediately began to make dies and incurred expense for the performance according to its own blue print, No. 25-101, there is no meeting of the minds constituting an agreement.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$819.77, for dies and material preparing to perform an oral agreement for pick mattocks. Held, there was no meeting of minds, and therefore no agreement, and that claimant is not entitled to recover.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim Form B was filed with this Board under P. S. & T. Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between claimant and an officer or agent acting under the authority of the Secretary of War.

The claim is for the value of steel bought to perform an alleged oral agreement between claimant and the Hardware and Metals Division, Purchase, Storage, and Traffic Division of the War Department.

A hearing was held December 23, 1918.

STATEMENT OF FACTS.

1. Some time before October 12, 1918, the Hardware and Metals Division requested bids on pick mattocks in accordance with blue print B/7.
2. On or about October 12, 1918, claimants submitted to the Hardware and Metals Division a bid covering the manufacture of 20,000 pick mattocks in accordance with claimant's blue print No. 25-101, dated October 12, 1918.
3. On October 22, 1918, Mr. Usher, vice president of claimant company, had an interview with Mr. Chas. H. Garrity, buyer for the Hardware and Metals Division, at which the placing of an order

was discussed, and Mr. Garrity told Mr. Usher that claimant "was going to be awarded" an order for the picks, and asked him to proceed with their manufacture in accordance with claimants' blue print No. 25-101.

4. Mr. Usher, however, did not wish to rely on this statement of Mr. Garrity as constituting an agreement with the Government, but insisted on having something in writing.

5. In compliance with Mr. Usher's request, Mr. Garrity stated to Mr. Usher that he had no authority to give such a writing, and referred the matter to his superior officer, Mr. George W. Welles, chief of procurement branch No. 1 of the division, who directed Mr. Garrity to prepare a letter for Mr. Welles' signature embodying the position of the department in relation to the proposed contract. This letter was prepared by Mr. Garrity and signed by Mr. Welles and delivered to Mr. Usher. The letter is dated October 22, 1918, and is in evidence as claimants' Exhibit 1. The material part of the letter is as follows:

"1. This office has recommended to the Contract Department the purchase of 20,000 pick mattocks as per blue print B/7 without handles at a price of $67\frac{1}{2}$ cents, f. o. b. Pittsburgh, 2 per cent cash 10 days, net 60."

6. Mr. Garrity states in his testimony that he had no authority to fix or change specifications or designate the blue print to be used without his chief's consent.

7. Upon receipt of this letter, claimants appear to have purchased the steel in question.

8. On October 25, 1918, claimants replied to above letter from Mr. Welles' office stating as follows:

"We acknowledge with thanks receipt of your letter of October 22nd, instructing that we enter your order for 20,000 pick mattocks prices up on accordance with our proposition to you of October 12th.

"We note, however, that in sending us this letter you have specified that the pick mattocks are to be per blue print B/7, whereas our quotation was made to apply for a substitute pick mattock as shown on Oliver blue print 25-101, dated October 12, 1918, copy of which we enclose herewith. * * *

"We have made this correction in the letter and are at work on the dies for making this forging. We hope to submit you a sample early next week and begin deliveries promptly November 1st at the rate of 4,000 per week, as required."

No reply to this letter was made and no further correspondence ensued.

These samples were not received up to November 12, 1918. No samples were ever approved, and no contract or formal order for the picks was ever issued.

DECISION.

1. The correspondence in this case does not show any meeting of minds between the claimant and the representatives of the Government on which an agreement can be predicated. It is clear from the evidence that the blue print was an essential basis of any kind of agreement that might be reached, and that no understanding was reached as to which blue print in question was to be used by the manufacturer.

2. The only evidence on which an agreement could be based is the testimony of Mr. Garrity at the hearing as to his conversations with Mr. Usher. This testimony shows clearly that Mr. Usher did not rely on any statements or representations of Mr. Garrity, but on the contrary, declined to accept them as final and insisted on a letter from the department.

3. This letter was given, but does not contain an order or request of any kind to the contractor, but merely a statement that the procurement branch of the Hardware and Metals Division had recommended to the Contract Department the purchase of 20,000 pick mattocks, without even saying that the recommendation related to claimant.

4. This statement does not constitute an agreement. Nor does it constitute any confirmation of Mr. Garrity's statements to Mr. Usher. On the contrary, the form in which Mr. Garrity wrote the letter and Mr. Welles signed it shows that both Mr. Garrity and his superior officer did not intend to change the specifications or to give any confirmation of Mr. Garrity's statements to Mr. Usher or that they should constitute an order or promise of any kind.

5. There is some testimony as to the approval of Mr. Garrity's statements by a Maj. W. R. Batchelor, at that time in the Hardware and Metals Division. It appears, however, that he was an officer of coordinate authority with Mr. Welles, and not in a position to ratify or confirm anything that Mr. Garrity might do.

6. The evidence does not show any circumstance from which an agreement on the part of the Government to pay for the steel can be implied.

7. There is, therefore, no evidence of any agreement, express or implied, within the terms of the act of March 2, 1919.

DISPOSITION.

1. The claim should be denied.

Col. Delafield, Mr. Bayne, and Mr. Huidekoper concurring.

Case No. 2038.

In re CLAIM OF PENN YAN CIDER CO.

1. **EXPEDITING DELIVERIES.**—Where claimant entered into an agreement to deliver to the United States Government a quantity of dehydrated carrots packed in cans, the Government is under no obligation under the act of March 2, 1919, to reimburse the claimant for loss sustained in spoiled vegetables caused by delay in the shipment of cans, where the evidence fails to show that the Government agreed to furnish the cans.
2. **CLAIM AND DECISION.**—This claim is presented under the act of March 2, 1919, upon the theory that the Government agreed to furnish cans in which to ship a certain quantity of dehydrated carrots purchased from claimant, and that by reason of delay in furnishing the cans claimant sustained a loss in spoiled vegetables in the sum of \$7,932.76. Held, that there was no agreement on the part of the United States Government to furnish the cans and that claimant is not entitled to the relief sought.

Lieut. Col. Williams writing the opinion of the Board.

FINDING OF FACTS.

This is an appeal from a decision rendered on the 9th day of September, 1919, by the Claims Board, Director of Purchase, Purchase, Storage and Traffic Division, denying relief upon a claim for \$7,932.76 on an alleged informally executed contract. The case grows out of the following facts and circumstances:

1. About March 10, 1918, Mr. Graham Parsons, president of the petitioner company, came to Washington and got in touch with Maj. (then Capt.) Ben Gallagher of the Subsistence Division of the Quartermaster's Department with a view to supplying dehydrated vegetables to the Government. This conference resulted in a tentative agreement at that time for the purchase from petitioner of about 100,000 pounds of dehydrated carrots. Later on, on the 22d day of March, the following telegram was sent to petitioner:

"This office is willing to place order fifty tons dehydrated carrots, packed fifteen pounds square lacquered cans soldered tops two in export case equal or better than sample. Not to contain more than eight per cent moisture, twenty five cents per pound."

This was followed by a letter of the same date from the Quartermaster General to claimant containing the following statement:

"This office is willing to enter a contract with you to purchase fifty (50) tons of this commodity of a quality equal to or better than

the sample submitted, the dried product not to contain more than 8 per cent moisture. They are to be packed in 15-pound square, lacquered tins, measurements of the tins $9\frac{3}{8}$ by $9\frac{3}{8}$ by $14\frac{1}{2}$. Tins to be soldered, thereby hermetically sealing same. Two of these tins to be packed in export case No. 3 preferred. The price to be paid for the carrots, packed as above specified, of the quality mentioned above, to be twenty-five cents (25¢) per pound f. o. b. factory, delivery to be started as soon as possible, and to be completed before May 31st. They are to be paid for, after inspection, each carload to be considered as a separate sale."

2. Under date of March 22, 1918, petitioner, upon receipt of the telegram from the Quartermaster General of the same date as above set out, sent the following telegram:

"Lt. BEN GALLAGHER,

"18th & Virginia Ave., Washington, D. C.

"Your telegram received. Order O. K. with us. Talked with Mr. Kellogg, Man. Am. Can Co. Rochester. He wishes you to wire him at once about the cans. Says with your request he can get our order filled at once. Let us know how you come out.

"Penn Yan Cider Co., Inc."

The letter of the Quartermaster General of March 22 was not received until after petitioner had sent its telegram of March 22, and petitioner did not respond to the Quartermaster General's letter of March 22 because Mr. Parsons regarded the substance thereof the same as the Quartermaster General's telegram of March 22 (Tr. p. 22).

3. Subsequent to the above exchange of telegrams embracing the contract for 50 tons of dehydrated carrots, and under date of April 10, 1918, a purchase order was issued for the 100,000 pounds (50 tons) of dehydrated carrots, embracing the same terms as set out in the Quartermaster General's letter of March 22.

4. On or about the 10th of March when Mr. Parsons, on behalf of petitioner, was negotiating with Maj. Gallagher for the order for dehydrated vegetables, petitioner desired to supply them in wooden containers, but Maj. Gallagher insisted upon tins. Petitioner expressed some doubt as to its ability to secure the tins under the then existing conditions of the industry, and it is alleged by petitioner that at that time Maj. Gallagher stated to Mr. Parsons that if the petitioner could not secure the tins the Government would. There is some conflict in the evidence as to what the Government, through Maj. Gallagher, at that time undertook to do with respect to these tins. Mr. Parsons says (Tr. p. 9):

"So I met Maj. Gallagher the next day, and I had a talk with the Major, and Lieut. Gallagher or Maj. Gallagher then did not favor the wooden package, and I said, 'Why, I don't see how we can get any cans.' He said, 'If you have any trouble we will get them

for you.' So I took the contract under those conditions. I went back to Penn Yan and from there to Rochester, and I got in touch with Mr. Kellogg, of the American Can Company."

Maj. Gallagher on the contrary, however, says (Tr. p. 65) :

"It is my remembrance Mr. Parsons wanted to use a wooden package. This wooden package was decided against, and we told him we would have to have the carrots packed in the 5-gallon cans, Pulp Royal cans. He brought up the point of the difficulty of securing these cans, *and we assured him we would give him whatever assistance possible to secure the same.*"

5. On March 23 petitioner wrote the following letter to Maj. Gallagher:

"Soon after our telegram to you on Friday in regard to your getting in touch with Mr. Kellogg, manager for American Can Co., Rochester, N. Y., branch, we had phone from him saying *he would be able to ship us the cans needed in ten days.* We told Mr. Kellogg we had wired you, and he said he wished you would get in touch with him, for by so doing very likely a better delivery could be made. We will be pleased to receive any papers necessary in regard to the sale of dried carrots from you, and just as soon as we are ready to go ahead with the work will wire you for inspector. Thanking you for your kindness to the writer while in Washington."

6. It appears from the evidence (Tr. p. 87) that Maj. Gallagher was of the opinion that a 10-day delivery was regarded as quite satisfactory and that there was at that time no occasion for the Government endeavoring to render any assistance to the petitioner in securing the cans. It appears further that the Government agents received no intimation from petitioner that there was any trouble in securing these cans until April 9, 1918, after the Subsistence Division had telegraphed the claimant as follows:

"How many pounds dried carrots will you ship by April twenty-fifth period. State size cans and weight dried products cans will hold."

The petitioner responded on the same date by the following telegram:

"Wabash freight agent Detroit refuses to accept cans because embargo. American Can Co. just notified us. We have wired J. W. Roberts, freight traffic manager, Penna Lines, Pittsburg, Pa., for permit to load cars of cans at Detroit for us. Have had no answer. Will you see we get permit at once? If we get cans will deliver thirty thousand pounds April 25th. Size cans nine and three-eighths by nine and three-eighths by thirteen and seven-eighths, packed two cans to export case, weight each can fifteen pounds."

7. Immediately upon receipt of this telegram Maj. Gallagher by telephone and by telegraph got in touch with the proper officials and in four days' time secured the lifting of the embargo upon the ship-

ment of cans out of Detroit over the Wabash Railroad; so that one carload of these tin cans were put on board the cars at Detroit on April 13 and shipped out, and another carload was shipped out on April 22.

8. There was great delay, however, in the transportation of these carloads of tin cans, so that the carload shipped on the 13th of April was received on the 10th of June, and the carload shipped on the 22d of April was received on the 31st of May.

9. On the dates of shipment invoices were made out by the American Can Co. and promptly forwarded to petitioner. Upon receipt of these invoices petitioner, assuming that the cans would be delivered with reasonable promptness, began to cut up and dehydrate the carrots. Due to delay in receipt of the cans, however, petitioner experienced considerable loss on account of not having containers in which to pack the dehydrated carrots, and this loss, alleged to have amounted to \$7,932.76, forms the basis of this claim.

10. It may be said also that, after the cans had been shipped, petitioner got in touch with Maj. Gallagher and asked for assistance in securing prompt delivery; and Maj. Gallagher, as well as Lieut. Putman, who had been sent to petitioner's plant as inspector, made every reasonable effort to trace the shipment and to secure prompt delivery.

11. When the cans were finally received at petitioner's plant they were promptly packed with the dehydrated carrots. It developed, however, in the meantime, that petitioner lacked the process by which it was possible to pack 15 pounds of sliced dehydrated carrots in these 5-gallon cans and representations to that effect were made to Maj. Gallagher and, in pursuance of these representations by petitioner, petitioner was allowed an additional 1½ cents per pound and permitted to pack 10 pounds of sliced dehydrated carrots in the tins.

12. The process of packing the two carloads of tin cans with sliced dehydrated carrots was completed on or about the 8th of June, 1918, and, due to the loss in these vegetables occasioned by the delay in the delivery of the cans, the packing of these two carloads of 4,010 5-gallon cans used up all of the available carrots that petitioner was able to secure.

13. In these circumstances Mr. Parsons came to Washington and got in consultation with Maj. Gallagher with a view to presenting a claim for the loss sustained on account of the delay in shipment of the cans; and there was a conference in the office of Col. Grove in regard to this matter at which were present Mr. Parsons, Col. Grove, Maj. Gallagher, and Mr. Gould, a Member of Congress. The question was there discussed of adjusting in some way the loss petitioner had suffered, and Col. Grove directed Maj. Gallagher to carefully go over the case and suggest some method of giving relief to petitioner upon

the idea that there may have been some moral liability upon the Government in not securing more prompt delivery of the cans. There is a dispute in the evidence as to what Maj. Gallagher said at the latter conference touching any alleged promise to petitioner at the conference on or about March 10. This matter is important, not as affecting any alleged original obligation made by Maj. Gallagher to petitioner on behalf of the Government, but merely of evidentiary value as to what actually did take place between Maj. Gallagher and Mr. Parsons on or about March 10. Mr. Parsons says that at the conference with Col. Grove and others, Maj. Gallagher said that on or about March 10 he had agreed to secure the cans for petitioner if petitioner could not, but that the Government was not liable for the delay in the delivery resulting from the negligence of the railroad company. Maj. Gallagher, on the other hand, says that at the conference with Col. Grove and others he said that he had told Mr. Parsons that if petitioner could not secure the cans the Government would render every assistance possible.

14. Col. Grove says, in regard to what took place at that conference, as follows (Tr. p. 82):

"My recollection, as I say, is not clear there, but I did gain the impression, however, at that time that perhaps we had not gotten behind it as energetically as we might have done it. Now, I do not believe Lt. Gallagher made the statement to me that he had promised to get the cans. It was not the custom, and I think if he had stated that in that particular case I would have remembered it. The general custom was to get behind those things and push where we could, but I don't remember any statement made that way; that is, where he said directly he would get the cans for them."

15. At the above conference with Col. Grove and others, Col. Grove directed Maj. Gallagher to go over the papers to see if some method of adjustment could be made. Subsequent to this conference the following correspondence took place between the Government and petitioner.

16. On July 1, 1918, the quartermaster telegraphed the claimant as follows:

"Contract will be changed to read twenty tons dehydrated carrots, twenty-eight cents pound, delivered Penn Yan."

In reply to this, on July 2, claimant telegraphed to Lieut. Gallagher:

"Price of twenty-eight cents pound is not satisfactory for our carrots."

Lieut. Gallagher replied to this telegram on July 3 as follows:

"Reference your telegram July 2 will make no further allowance on carrot contract. Inform whether or not you intend accepting price twenty-eight cents."

On July 13 the claimant wrote Capt. Ben Gallagher the following letter:

"Your telegram of the 12th saying that you will give us 28c. per lb. received. After the talk you and Colonel Grove had with Congressman Gould and myself in Colonel Grove's office several weeks ago *we feel you have not allowed us enough for the loss incurred on the carrots due to the tardy delivery of cans.* We are perfectly willing to stand part of this loss, but do not feel that we should stand all of it.

"We are willing to consider 32c. per lb. We can give you immediate shipment on 4,010 cans and ask you to wire us at once."

On July 15 Lieut. Gallagher sent the following telegram to the claimant:

"Reference your letter of the thirteenth. No intention increasing price beyond twenty-eight cents. Request some early action be taken. No shipments accepted till this is definitely decided."

On July 19, 1918, the claimant telegraphed the following to Lieut. Gallagher:

"Send shipping instructions for forty thousand one hundred pounds dehydrated carrots at twenty-eight cents per pound at once. Also mail back at once our papers left with you several weeks ago."

On July 22 Capt. Gallagher wrote the claimant with reference to shipping instructions and the records show that the claimant shipped 40,000 pounds of dehydrated carrots according to instructions and that they have been paid at the rate of 28 cents the pound.

17. The 40,000 pounds of dehydrated carrots were all that petitioner tendered or could deliver to the Government, and they were delivered to, accepted, and paid for by the Government.

DECISION.

1. The claim here presented is based solely upon the alleged loss occasioned by the delay in transit of the carloads of cans. It is not claimed that the Government is under obligation to take the remainder of the 100,000 pounds of dehydrated carrots, because it is plainly shown by the testimony of petitioner that petitioner could not deliver more than the 40,000 pounds which were delivered and paid for. So that the sole question presented is whether or not the Government, through Maj. Gallagher, obligated itself at the conference between Mr. Parsons and Maj. Gallagher on or about the 10th of March to deliver the cans to petitioner.

2. This Board is of the opinion that there was no such obligation created upon the part of the Government. The petitioner wanted to supply the vegetables in wooden containers but Maj. Gallagher insisted upon tin containers. Petitioner then expressed some doubt as to whether or not he could secure the tin containers, and this doubt unques-

tionably had reference to the then unsettled state of the commercial manufacturing industries of the country or to any restrictions which the Government might or could place upon the securing of the tins. If petitioner had understood that the Government had obligated itself to actually secure and deliver to it the tin cans in which the dehydrated vegetables were to be packed, petitioner would hardly have entered into the agreement of March 22 in which petitioner itself agreed to furnish the tins in which to pack the dehydrated vegetables. All the circumstances surrounding the conference between Maj. Gallagher and Mr. Parsons on or about the 10th of March, as well as the testimony of Maj. Gallagher himself, indicates very clearly to this Board that there was merely an undertaking upon the part of Maj. Gallagher to render to the petitioner such assistance as the Government could render in case the petitioner found difficulty in securing the cans. Moreover the conduct of petitioner is in line with the same notion, because Mr. Parsons immediately left Washington and went to see Mr. Kellogg of the American Can Co. and made a contract with him for the tin cans and, under date of March 23, after having received the purchase order for the dehydrated vegetables, Mr. Parsons wrote Maj. Gallagher and said Mr. Kellogg had promised delivery of the cans in 10 days. We think that Maj. Gallagher is right when he says (Tr., p. 87) that upon receipt of this letter from petitioner he regarded the 10-day promise of delivery by the American Co. as highly satisfactory in the situation as it then existed. Subsequent to March 23, and until April 9, the Government agents had no reason to believe but that the American Can Co. was living up to the agreement which it made with Mr. Parsons for the 10-day delivery. Upon the receipt of the telegram of April 9, however, Maj. Gallagher lost no time in securing the lifting of the embargo of shipments on the Wabash Railroad out of Detroit. This embargo was lifted in four days' time and petitioner was notified that one car of these tins had been placed on board on the 13th of April and shipped out and another car on the 23d of April. The Government had lived up to its agreement and had rendered to the petitioner what assistance it could in the securing of the cans, and had, in a certain light, actually secured the cans for petitioner on board the cars at Detroit and had them shipped out. The Government then had no occasion or reason to believe that the cans would not be delivered with reasonable promptness. As soon, however, as the Government was notified that there was delay in the delivery of the cans, every effort was made by Maj. Gallagher, as well as by Lieut. Putman, who had been sent to petitioner's plant as inspector, to trace the shipment of the cans and secure their prompt delivery. These efforts on the part of the Government in securing the cans and their prompt delivery were not, in a strict sense, a part of the legal

obligation of the Government entering into and forming a part of the consideration for the contract for the supply by the petitioner of dehydrated carrots, but these efforts were made by the Government in its own interests in assisting petitioner in every way possible in fulfilling its contracts for the delivery of the dehydrated carrots for which the Government had great need.

3. In this view of the case, it is not necessary to pass upon the question as to whether or not, if there had been an agreement entered into between Maj. Gallagher and Mr. Parsons on or about March 10, the same was merged into the contract subsequently entered into in writing between the parties for the supply of the 100,000 pounds of dehydrated carrots; nor is it necessary to pass upon the question as to whether or not the final allowance of 28 cents per pound for the 40,000 pounds of dehydrated carrots delivered to and accepted by the United States, as set forth in the correspondence quoted in paragraph 16 of the Statement of Facts hereto attached, is to be construed as a final adjustment of all matters involved in the claim here presented.

4. For the reasons above stated, all relief asked for in this case must be denied.

DISPOSITION.

A copy of this finding of fact and decision will be transmitted to the Claims Board, Director of Purchase, for its information.

Col. Delafield and Mr. Smith concurring.

Case No. 623.

In re CLAIM OF PORT DEPOSIT QUARRY COMPANY.

1. **COMPLIANCE WITH GOVERNMENT ORDER.**—Where a claimant was instructed by officers of the Construction Division of the Army to cease selling one of its products to private customers because this was urgently needed for Government purposes and was assured by them that it would be paid actual cost plus a reasonable profit on the amount delivered on their orders, there was an agreement within the terms of the act of March 2, 1919, such as will entitle claimant to be paid the difference between cost plus reasonable profit and the amount actually received.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for additional remuneration for crushed stone supplied by claimant on the understanding that it would receive actual cost plus a reasonable profit. The amounts paid were alleged to be less than cost. Held, claimant is entitled, under the act of March 2, 1919, to be paid the actual cost of its product plus a reasonable profit.

Mr. Shirk writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$5,569.67, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The petition alleges that on or about June 24, 1918, the claimant entered into an agreement for furnishing crushed stone for the use of the United States at Aberdeen Proving Ground and Edgewood Arsenal in a quantity equal to the entire output of the claimant's quarry (which output is alleged to have been 10,859.742 tons) at a price sufficient to cover all actual expenses of production plus a reasonable percentage of profit, such price being, in the opinion of the petitioner, \$2.30 per ton, making an aggregate sum of \$24,977.40. It is claimed by the petitioner that it actually delivered 10,859.742 tons, and that for 2,796.95 tons it has been paid at the rate of \$1.75 per ton, amounting to \$4,894.70, and that for 8,062.792 tons it has been paid at the rate of \$1.80 per ton, amounting to \$14,513.03, making a total amount paid to it of \$19,407.73. Deducting that amount

from 10,859.742 tons at \$2.30 per ton leaves a balance of \$5,569.67, which the petitioner claims is still due it.

3. The Construction Division of the Army was engaged in certain construction work at Edgewood Arsenal and Aberdeen Proving Ground. Such construction work was being done for the United States at Aberdeen by one constructing contractor, namely, Maryland Dredging and Contracting Co., and at Edgewood by three constructing contractors, namely, Mellon-Stuart Co., The Foundation Co., and the Central Construction Co. The contracts between the United States and those constructing contractors all provided that those contractors were to do the construction work and that the United States would reimburse them for all costs of construction, including costs of materials used, and in addition would pay them a fee or compensation by way of profit. In order that they might do the necessary construction work it was necessary that they should have crushed stone and gravel, which was not then available in sufficient quantities.

4. H. V. Wallace, Major of Engineers, detailed to the Construction Division, was supervising officer at Edgewood and Aberdeen and had charge of those two jobs. In order that the crushed stone, which was urgently needed, might be obtained, Maj. Wallace directed one of his subordinates, Maj. O'Dell, to get the crushed stone necessary. Maj. O'Dell then went to the various sources in the vicinity, among which was the quarry of the claimant at Port Deposit, Md.

5. The claimant had a granite quarry there and was engaged in the business of quarrying and producing building stone. In quarrying stone for that purpose some of it was broken too fine to be, or for other reasons was not, available for building purposes and such stone the claimant crushed and disposed of as crushed stone, being a by-product incidental to its business of producing building stone.

6. On or about June 24 or 25, 1918, Maj. O'Dell called on Mr. Cameron, the claimant's president, at its quarry and stated to him the urgent need of the Government for crushed stone. Maj. O'Dell told him to stop shipping crushed stone except for the Government, which needed all his plant could produce, and directed him to ship only to contractors doing Government work. Maj. O'Dell told him that he had no option in the matter and asked him whether he would comply, stating that if he would not comply, he, Maj. O'Dell, would take the proper steps through Washington to compel him to comply under existing law. Mr. Cameron stated that he would comply. About two days later, June 27, Maj. O'Dell again called on Mr. Cameron and said that he, Maj. O'Dell, was to have

the distribution of stone and Mr. Cameron was to ship only to places designated by him, and left with him a paper reading as follows:

"Port Deposit Quarry Co. will change crusher concave and head if necessary to produce $\frac{1}{2}$ -inch to $1\frac{1}{2}$ -inch stone and ship 50 per cent to Magnolia and 50 per cent to Edgewood until further notice.

"Daily reports to be made showing car nos., initials, and destination also sizes of stone shipped in each case.

"Consign to U. S. Constructing Q. M.

"For account of -----

"At -----

"Major J. C. O'Dell, Q. M. C. N. A.,

"North East, Md."

(Magnolia is a shipping point for Edgewood.)

Maj. O'Dell told Mr. Cameron that he was not authorized to discuss prices at all.

7. Mr. Cameron met Majs. O'Dell and Wallace at Aberdeen on or about July 9, 1918, and Maj. Wallace stated that he could not discuss prices for the stone at that time but that, in order to forestall excessive prices being charged by the various quarrymen furnishing stone, he intended to send a board of survey to determine the cost of production and that the various quarrymen, including the claimant, would be paid by the Government the cost of production of the stone, plus a reasonable profit.

8. On July 9 the Aberdeen Proving Ground wrote the claimant two letters, as follows:

"ATB:RC

"WAR DEPARTMENT,

"ABERDEEN PROVING GROUND,

"P. O. Aberdeen, Md., July 9th, 1918.

"PORT DEPOSIT QUARRY CO.,

"Port Deposit, Md.

"SIRS: In reference to our conversation with your Mr. Cameron to-day, you are hereby given an order for 10,000 net tons of $\frac{1}{2}$ -inch to $1\frac{1}{2}$ -inch crushed stone, shipment to begin immediately and continue at the rate of five cars per day until the order is filled.

"A formal order to cover this material will be forwarded as soon as arrangements as to price are made.

"Respectfully,

"A. B. ROBERTS,

"Capt., Ord., R. C., Assistant Constructing Officer.

"By ALAN T. BOWLER,

"2nd Lieut., Q. M. C., N. A."

"JCO/hr

"WAR DEPARTMENT,

"ABERDEEN PROVING GROUND,

"P. O. Aberdeen, Md., July 9, 1918.

"MR. W. P. CAMERON,

"President Port Deposit Quarry Co., Port Deposit, Md.

"DEAR SIR: Beginning at once ship all stone $1\frac{1}{2}$ -inch down to $\frac{1}{2}$ -inch to Aberdeen, consigned to the assistant constructing officer for

the account of the Maryland Dredging and Contracting Co., Aberdeen Proving Ground, Aberdeen, Md. All stone above $1\frac{1}{2}$ inches and up to 3 inches ship to Edgewood, Md., consigned to the constructing officer for the account of Mellon-Stuart Co. The constructing officers at Edgewood and Aberdeen will send you formal orders covering this.

"Send report to me at Northeast, Md., each day showing number and initials of car shipped and to whom consigned. This order covers the total output of the Port Deposit Quarry Company. Please acknowledge receipt and understanding of these instructions.

"A. B. ROBERTS,

"Capt., Ord., R. C., Asst. Constructing Officer.

"By JOHN C. O'DELL,

"Major, Q. M. C., N. A."

9. On July 11 claimant received a letter as follows:

"ABR/hr

"WAR DEPARTMENT,

"ABERDEEN PROVING GROUND,

"P. O. Aberdeen, Md., July 11, 1918.

"PORT DEPOSIT QUARRY Co.,

"Port Deposit, Md.

"GENTLEMEN: Confirming verbal instructions from Major O'Dell, it is expected that your entire output will be required by the United States Government, and shipping instructions will be supplied from time to time by Maj. O'Dell, or his representative.

"A. B. ROBERTS,

"Capt., Ord., R. C., Asst. Constructing Officer.

10. Pursuant to the arrangement and from time to time the claimant received from the four constructing contractors mentioned, purchase orders for stone to be consigned to the assistant constructing officer of the Construction Division, for the account of the various constructing contractors. Such purchase orders were approved in the lower left-hand corner by the assistant constructing officer himself or in his name by one of his subordinates. From time to time claimant shipped crushed stone to Aberdeen and Edgewood, consigned to the constructing officer, and after its receipt at its destination it was allocated by the constructing officer to the particular constructing contractor which, for the time being, needed crushed stone the most urgently.

11. The claimant received such a purchase order dated July 22, 1918, from the Maryland Dredging and Contracting Co. for stone at \$1.25 per ton. Immediately on its receipt, Mr. Cameron called up Maj. O'Dell and said that it was impossible for them to furnish stone at \$1.25, and that all they could do was to quit. Maj. O'Dell told him to get in touch with Maj. Wallace, and Mr. Cameron accordingly saw Maj. Wallace on or about July 23, and stated to him that they could not furnish stone at \$1.25 a ton, and that

they had understood from Maj. Wallace that they were to get actual cost plus a reasonable profit. Maj. Wallace then said that the company would not be required to operate at a loss, and that he would send an officer to determine costs, and that the Government would pay them actual cost plus a reasonable profit. Maj. Wallace said that pending such investigation and determination of costs claimant would be paid \$1.80 per ton for all stone furnished pursuant to Maj. O'Dell's original arrangement with him, and that after an investigation and determination of costs the price of \$1.80 would be adjusted and raised or lowered accordingly as the costs might appear. Mr. Cameron stated that that was satisfactory to him, and that the claimant would proceed on that basis. Accordingly, the Maryland Dredging and Contracting Co. sent to claimant a new purchase order dated July 24, in which they canceled the one at \$1.25 per ton and substituted the new one at \$1.80 per ton "in accordance with verbal instruction from Maj. Wallace to Capt. E. R. Blanton, July 23, 1918." Thereafter claimant continued to furnish stone at the tentative price of \$1.80 per ton.

12. At about that time Lieut. Shea appeared at the claimant's quarry with a letter of introduction dated July 23 from Maj. Wallace requesting claimant to allow Lieut. Shea to have access to its plant and to give him any information which he might seek. Lieut. Shea asked for their figures showing cost of production, and they gave him a statement thereof. Lieut. Shea examined their pay rolls, books, etc., covering a period of four weeks' production. After his examination he stated that he would recommend \$2.30 a ton as the price to be paid to them.

13. On August 21 the company wrote to Maj. Wallace stating that they thought it was only reasonable to request him to advise them what price they were to receive. It does not appear that Maj. Wallace replied, although on or about August 23 Lieut. Shea telephoned Mr. Cameron about the matter.

14. On September 10 the assistant constructing officer at Aberdeen wrote claimant that so far as furnishing crushed stone to the Government was concerned they were at liberty to close down.

15. All of the payments which the claimant has received have been made directly to it by the various constructing contractors who actually used the stone.

16. On September 28 Mr. Cameron wrote to Maj. Wallace about the matter of price, and the latter advised him to take it up with the War Industries Board at Washington. Mr. Cameron did that, but the War Industries Board refused to take any action and referred him back to the officer who placed the order. The cost of production, plus a reasonable profit, has never been determined authoritatively by anyone on behalf of the Government, and the

price has never been adjusted. The claimant therefore comes before this Board.

DECISION.

1. We think that the arrangement made by Maj. O'Dell and Maj. Wallace with the claimant amounted to an agreement that the Government would see to it that the claimant was paid for all crushed stone furnished pursuant to said agreement the actual cost to it of the production thereof plus a reasonable profit.

DISPOSITION.

1. This Board will make a statement of the nature, terms, and conditions of the agreement and certificate C, and will cause appropriate personnel to do the following things:

(1) To check up the quantities of crushed stone furnished by the claimant to Edgewood and Aberdeen, respectively;

(2) To check up the amounts already received by the claimant for the crushed stone furnished by it to Edgewood and Aberdeen, respectively; and

(3) To examine into the claimant's books, accounts, papers, records, etc., and to determine the cost to it of producing said stone, and to report the result of said examination to this Board.

2. Upon the coming in of said report this Board will find the cost of production and, if the same plus a reasonable profit is in excess of the amounts already received by the claimant, will cause a statutory award to be made to it for such excess, but in no event shall the gross amount to be received by the claimant exceed \$2.30 per ton, the amount of the claim; and will cause said award to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield, Lieut. Col. Carruth, and Mr. McCandless concurring.

Case No. 1763.

In re CLAIM OF FRANKLIN KNITTING MILLS.

1. **INCREASED FACILITIES: BY SUBCONTRACTOR.**—Where claimant increased its facilities to enable it to perform a subcontract with a prime contractor, who had a Government contract, and the prime contractor's contract with the Government was suspended, and it in turn terminated its subcontract with claimant, there is no contract, express or implied, between the claimant, the subcontractor, and the Government, whereby the Government should reimburse claimant for expenses incurred in increasing facilities.
2. **JURISDICTION—TIME OF FILING.**—This Board can not take jurisdiction of a claim under the act of March 2, 1919, filed on December 12, 1919.
3. **Release of prime contractor also releases the Government.** Where the subcontractor, having no contractual relations with the Government in the matter, releases the prime contractor from all liability he can not thereafter obtain relief from the Government under the act of March 2, 1919.
4. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$16,382.83 for increased facilities to enable claimant to perform a subcontract with Alexander Propper & Co., prime contractor, which company had a contract with the Government for the manufacture of 300,000 pairs of spiral puttees. Held, claimant is not entitled to recover.

Mr. Harding writing the opinion for the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$16,382.83, by reason of an agreement alleged to have been entered into between the claimant and Alexander Propper & Co. as prime contractor.

FINDINGS OF FACT.

1. The claimant was a subcontractor under the firm of Alexander Propper & Co. of New York City, who are asserting before this Board in No. 150-C-534 a claim against the Government under contract No. 2006-N to furnish 300,000 pairs of spiral puttees. Claimant there alleges that the contract for 300,000 pairs of spiral puttees to be furnished to the Government under that contract was increased by authorization to an additional amount of 10 per cent over-deliveries to be made by the prime contractors. Claimant here alleges that the prime contractors ordered large quantities of cloth to be manufactured by the claimant, to enable the prime contractors to fill their Government contract including 10 per cent over-deliveries,

and that in order to manufacture and furnish the large quantities of cloth ordered by the prime contractors from the claimant the claimant had to install additional machinery in its plant. Neither subcontractor nor prime contractor assert that there was any contract between them about the machinery. The contract between the subcontractor and the prime contractors had not been completed when the armistice was signed and the contract was terminated for that reason. The claim is made by the claimant here that it expended \$16,382.83 to equip its plant to furnish the prime contractor this unusually large quantity of cloth.

2. No contractual relation is asserted or shown between the Government and the claimant, and the claim is not asserted through the prime contractors but is an independent claim filed by this claimant, the subcontractor, for itself.

3. After the termination of the Government contract with Alexander Propper & Co., the prime contractors, the Government made a settlement with them, and before doing so obtained a release from this claimant as subcontractor, which is as follows:

NEW YORK, *July 17, 1919.*

The honorable the SECRETARY OF WAR.

(Through the Zone Supply Office, New York, 461 Eighth Street, New York City.)

Attention Negotiating Officer, Procurement Division.

DEAR SIR: We beg to inform you that we have adjusted our claim against Alexander Propper & Co. upon a satisfactory basis, and that we hereby withdraw our questionnaire, filed on or about June 25, 1919, and that we have no claim arising out of the questionnaire filed by Alexander Propper & Co. on or about December 23d, 1918, or the payment thereof, and we hereby consent to the payment thereof to the said Alexander Propper & Co.

Yours faithfully,

(Sgd.)

FRANKLIN KNITTING MILLS,
By SIG MORRIS, *Pres.*

4. The claimant no doubt used the word "questionnaire" as synonymous with their petition filed in this claim, as no formal questionnaire was filed by it, but on the same date, June 25, 1919, they made affidavit to their claim which was received by the Quartermaster General on the same date.

5. The claimant did not have an enforceable claim against the prime contractor for the machinery and did not enter into any contract, express or implied, with the Government, nor were there any negotiations or dealings of any kind between the claimant and the Government nor any Government official, nor does the claimant assert that there were.

6. On December 12, 1919, upon the hearing of the case, Alexander Propper & Co. filed a claim dated December 11, 1919, for and on

behalf of this claimant, in which it set up the business transactions between Alexander Propper & Co. and the claimant as subcontractor, and requested the Secretary of War to adjust, pay, or discharge the subclaimant upon a fair and equitable basis, etc.; but it files the claim on the understanding that it should be without prejudice to the claim of Alexander Propper & Co. against the United States, pending at the same time.

7. This claim was heard in connection with that of the prime contractor, Alexander Propper & Co., on December 12, 1919, and the testimony in this case will be found in the record of that one, but the testimony is immaterial, irrelevant, and incompetent to sustain any claim, and need not be considered.

DECISION.

1. There being no contract or agreement, express or implied, between the claimant and the Government, and there having been no business relations whatever between the claimant and the Government, and the Government having been released from any claim, if any might have been asserted against the Government as a part of the adjustment with Alexander Propper & Co., the prime contractor, there is nothing upon which this Board can act.

2. The paper filed by Alexander Propper & Co. on behalf of this claimant (findings of fact 6) is of no force, nor can we give to it any effect. It does not ask that we make any adjustment in favor of the claimant here as a part of the amount going to Alexander Propper & Co., if any, but specifically precludes the participation of this claimant in any amount that might be found due to the prime contractor, and it being filed December 12, 1919, and being the assertion of a new claim not theretofore filed or presented, this Board has no jurisdiction to consider it at all.

The claim is disallowed and the petition dismissed.

Col. Delafield, Mr. Eaton, and Mr. Huidekoper concurring.

Case No. 585.

In re **CLAIM OF NOVO ENGINE CO.**

1. **RECOMMENDATION . DOES NOT CONSTITUTE A CONTRACT.**—Where claimant submitted an unsolicited proposal to furnish air compressor outfits, and was told by a Government agent that he would recommend a contract, but that he had no authority to make a contract, and then claimant incurred expenses, and no contract issued, there is no agreement on the part of the Government to reimburse claimant for expenses so incurred.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$630.18, expenses alleged to have been incurred in preparing to perform an anticipated contract, claimant having been advised that a contract would be recommended, but that the officer had no authority to make a contract.

Mr. Huidekoper writing the opinion for the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$2,239.68 (but subsequently reduced to \$630.18 by withdrawal of a part of the claim) by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On October 8, 1918, the Washington manager of the claimant company wrote a letter to "Mr. Wayne Murray, Motor Transport Corps," Washington, D. C., which contained an unsolicited proposal to furnish the following engine-driven air compressor outfits to operate pneumatic tools:

- 4 or more No. 162 Novo 10-H. P. engine driven Imperial type portable air compressor outfits, including parts enumerated as described in the company's catalogue, f. o. b. Lansing, Mich., at \$1.003 each.
- 4 sets of repair equipment (enumerated by the separate articles) for engine and compressor at \$27 per set.

3. Attached to the statement of claim and forming a part thereof is a letter dated January 2, 1919, setting forth the items of claim and the alleged oral agreement on which the claim is based, written by C. A. Stuck, the Washington manager of the claimant company. Paragraphs 2, 3, and 4 of this letter of January 2 are as follows:

"The writer personally presented this quotation to Capt. Murray on October 8, and at that time was advised that we would receive the

order for the equipment, as outlined in the quotation. Under those conditions, I advised Capt. Murray we would enter the order for this equipment at once, with the idea of making shipment of the outfits at the very earliest possible moment, as it was our understanding that they were very badly needed.

"On November 5, 1918, I was advised by phone that the formal order had been held up awaiting information from Ingersoll-Rand & Co. in connection with air tools. On November 13th and 12th I was advised that the air-tool information had been received, or, at least, that the order for the compressor outfits, in accordance with our quotation of October 8th was being written up. On November 19th, I was advised further that the order had been written and had left the department. However, the formal order for this equipment never reached our hands, and, ten days or two weeks after the last date mentioned, we were advised that the entire proposition had been cancelled.

"Now, regardless of the fact that we never had a formal order for this equipment, we feel that under the circumstances we are entitled to compensation in connection with this order to the extent of the expense involved, and we are therefore submitting the following statement for your consideration, this statement showing the exact status of this order at the time the definite cancellation instructions were received."

On February 6, 1919, Mr. C. A. Stuck wrote to the vehicle section Motor Transport Corps, as follows:

"Owing to the press of other matters. I have not been able to write you in connection with our adjustment proposal under date of Jan. 2nd, but I now wish to supplement the statements in the second paragraph of this proposal by advising that Captain Murray, during my interview with him on October 8th, did advise that he could not officially place the order for this equipment with me, but that he intended putting the order through for our equipment. I did not intend our original statement in this respect to be misleading, and desire you to know exactly what our understanding of this matter was.

"However, Captain Murray made it perfectly clear that it was his intention to put the order through, and under those conditions we entered the order with our factory. This statement is borne out by the fact that the order was actually written up later and then held up in your order department."

4. Included in the claim as originally presented, the claimant charged to the Government the cost price of various items as marked on a blue print referred to, aggregating in value the sum of \$1,289.82, also other items marked on the blue print, aggregating in value the sum of \$319.68, being the price of certain articles which claimant contemplated furnishing under its proposal of October 8, 1918.

These items of claim were withdrawn by the claimant by letter of December 9, 1919, to the Board of Contract Adjustment, which

stated that all the items marked on the blue print, with the exception of some pipe fittings which had been disposed of, were in stock. This letter contains the following:

"We are anxious to get this matter settled up as soon as possible and we want to revise our claim providing it will expedite settlement. We will put all of the material on this claim in our stock and dispose of same without any expense to the Government, and revise our claim to include only three items mentioned in our letter of January 2 as follows:

(1) Ten per cent charge for handling, storage, investment and a small portion of the general shop overhead-----	\$128.98
(2) We propose to keep the four ten H. P. engines in our stock, charging you ten per cent on the bottom manufacturer's price, this to cover change of crank shaft, as the ones furnished for the engines on this order are shorter than those used on our regular engines. This number of engines also creates an excess stock which involves a carrying charge. For ten H. P. engines with magnetos at \$223.00—\$892 @ 10%-----	89.20
(3) The complete billing price for the equipment to be furnished on this order would be \$4,120.00 on which amount we are entitled to 10%, account engineering work, disorganization of shop schedule and general expense-----	412.00
Total-----	630.18

"On the basis of this revised claim we will accept a net cash settlement of \$630.18 and relieve the Government of all responsibility or expense as to the material on hand."

DECISION.

1. The claim as amended is for \$630.18, and is for services, expenses, and charges resulting from the acquisition of machinery and parts alleged to have been obtained in reliance of an agreement claimed to have been entered into on October 8, 1918, between claimant's representative, Mr. C. A. Stuck, and Capt. Wayne Murray, Q. M. C., of the Spare Parts, Tires, and Accessory Section, Motors Department, Purchase, and Traffic Division, of the Quartermaster General's Department, whose duty it was to handle requisitions for the Motor Transport Corps.

2. The claimant's representative, Mr. Stuck, with whom the agreement is alleged to have been made on October 8, 1918, has submitted a letter dated February 6, 1919, in which he states that in his interview with Capt. Murray on October 8 Capt. Murray said he could not place an order with the claimant, but that he intended to put an order through for the claimant company. Mr. Stuck states that as a result of these remarks of Capt. Murray he entered an order with his factory.

It further appears that on November 5 Mr. Stuck was verbally informed that the proposed order was held up, and that after the signing of the armistice he was further informed that an order was being

prepared, but the claimant never received such an order, and was later advised that the entire proposition had been cancelled.

3. No contract was entered into on October 8 between Capt. Murray and Mr. Stuck, the claimant's representative. No agreement, express or implied, can be predicated on what Capt. Murray said at that conference. Even though Capt. Murray expressed the intention to put an order through, he distinctly told the claimant's representative "that he could not officially place an order for this equipment." It is clear that no definite order was given claimant's representative by Capt. Murray, nor was the claimant authorized to procure material in contemplation of such order. It follows, therefore, that the claimant is not entitled, under the act of March 2, 1919, to remuneration for obligations and expenses incurred, or for losses sustained, by reason of acquiring materials to manufacture machines in anticipation of receiving a Government order which it never did obtain. This is equally true, although it appears that an officer of the Government strongly intimated to the claimant that such an order would be placed with claimant, and no valid reason appears to account for the order having been withheld. (See Claim Stanley Skid Chain Co. 1 Dec. Bd. Cont. Adj. 62.)

4. This Board has also held that a claimant is not entitled to reimbursement for obligations incurred on account of misinformation given claimant by its representative. (Claim National Enameling & Stamping Co. 1 Dec. Bd. Cont. Adj. 418.) Thus, even though Mr. Stuck may have placed an order for the machine with his company after his conference with Capt. Murray, the Government is not bound, because it never gave the claimant or its representative such an order.

5. As the claimant has failed to show that it entered into an agreement, either express or implied, with the Government, it is not entitled to the relief prayed for under the act of March 2, 1919.

The Board is, therefore, of the opinion, for the reasons herein stated, that the relief prayed for should be denied, and it will be so ordered.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 1674.

In re CLAIM OF C. H. COWDREY MACHINE WORKS.

1. **INSTRUCTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACTS.**—Where claimant was instructed over the telephone to proceed, without waiting for a procurement order, to manufacture 1,342 recoil mechanisms for tractor guns of the same kind and at the same price as those manufactured for the Government under a previous written contract, and the claimant proceeds to fill the order, which was later countermanded, the United States is obligated, under the act of March 2, 1919, to reimburse the claimant its loss sustained in expenses made preparatory to filling the order, before same was countermanded.
2. **CLAIM AND DECISION.**—This claim arises under the act of March 2, 1919, on an alleged informal contract to supply the United States Government with 1,342 recoil mechanisms for tractor guns. Held, that the conversations and negotiations between the representative of the claimant and the United States Government constitute an agreement under which the United States Government is obligated to reimburse the claimant its expenses necessarily incurred preparatory to filling the order.

Mr. Patterson writing the opinion of the Board.

PRELIMINARY STATEMENT.

This claim arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under the following circumstances:

Claimant had a contract with the Ordnance Department, No. P8976-2514A, dated May 31, 1918, for the manufacture and delivery of 600 recoil mechanisms for 37 mm. tractor gun, model of 1916, at \$400 each, a total of \$240,000. This contract was in form, but proxy signed: Col. Samuel McRoberts, Ordnance Department, N. A., being named as contracting officer, and the actual signature being affixed by Chas. N. Black, lieutenant colonel, Ordnance, N. A.

The 600 mechanisms or groups covered by this contract having been delivered, claimant filed with the Boston District Claims Board, Ordnance Department, its statement of claim, Form A, aforesaid, for the agreed price of said 600 mechanisms and for the further sum of \$8,509.62, which last sum it claimed was the total of expenditures made or commitments incurred by it in preparing to perform a promised contract for 1,342 additional recoil mechanisms. In said statement of claim it characterized said order for 1,342 additional mechanisms as an amendment to contract No. P8976-2514A.

The Boston District Claims Board of the Ordnance Department on April 8, 1919, tendered the claimant an award in respect of the order for 1,342 additional recoil mechanisms for the amount claimed by it, \$8,509.62, less salvage value of materials, etc., \$3,773.79. or \$4,735.83, net. This was accepted by claimant June 23, 1919, and the file finally transmitted to Ordnance Claims Board, Washington, D. C., June 27, 1919. On July 26, 1919, said last mentioned Board transmitted the file and award to this Board for consideration and action.

The claim of the original contract of May 31, 1918, for 600 recoil mechanisms having been settled and disposed of, this Board has before it, therefore, only the claim upon the alleged order for 1,342 additional recoils. This is a class B claim and independent of the contract above mentioned and has been treated accordingly.

FINDINGS OF FACT.

The Board finds the following to be the facts:

I.

Claimant at the times hereinafter mentioned was a copartnership having its place of business at Fitchburg, Mass., and was engaged upon the performance of a contract with the United States of America for the production and delivery of 600 recoil mechanisms for 37-mm. tractor guns, model of 1916. Maj. George R. Nichols, Jr., Ordnance Department, was chief of the Artillery Section, Procurement Division, Ordnance Department, United States Army. Capt. Arthur Day was his assistant and was in special charge of the procurement of all articles entering into the composition of the 37-mm. tractor gun.

II.

On or about October 8, 1918, George B. Warner, an employee of claimant, conferred at Washington, D. C., with Maj. Nichols aforesaid relative to the completion of its existing contract for 600 recoil mechanisms and to further contracts for additional mechanisms. On or about October 10, 1918, said George B. Warner, who had returned to Fitchburg, Mass., had a conversation over the telephone with said Maj. Nichols at Washington in which said Maj. Nichols directed him to proceed with the manufacture of 1,342 additional recoil mechanisms for 37-mm. tractor guns modified for tanks, and that an order would follow. Said Maj. Nichols later on the same day reported the substance of this conversation to his assistant, Capt. Arthur Day aforesaid. Maj. Nichols died before the hearing herein.

III.

The direction given by Maj. Nichols to claimant to proceed with the manufacture without waiting for a formal order or contract was in accordance with the custom of the said Artillery Section, Procurement Division, Ordnance Department, and claimant had upon previous occasions proceeded with the manufacture of articles required by said Procurement Section upon the verbal orders of Maj. Nichols and Capt. Day and their assurances that contracts would follow. This was the case in connection with the contract of May 31, 1918, for 600 recoil mechanisms above referred to. In some cases claimant began deliveries before the formal contract arrived.

IV.

On or about October 24, 1918, the Procurement Division, Ordnance Department, by Maj. George R. Nichols, Jr., aforesaid, through the Director of Purchase and Supplies of Ordnance Department, requested from the clearance office of Requirements Division, War Industries Board, the clearance of 1,342 recoil groups for 37-mm. infantry gun, model 1916, for tanks, with the statement that bids would be requested from C. H. Dowdrey (sc. Cowdrey) Machine Co., Fitchburg, Mass., and Allen Motor Co., Fostoria, Ohio. Said request was returned October 25, 1918, with the following memorandum of action by the War Industries Board:

"Cleared with understanding that new facilities are not necessary to meet requirements scheduled."

There was no intention in the Artillery Section, Procurement Division, Ordnance Department aforesaid, to place the order for these mechanisms or any part of them with Allen Motor Car Co. (referred to in said clearance request as Allen Motor Co.), for the reason that that company had been unable at the time referred to to make any deliveries whatever on a previous order placed with it.

Subsequently to said telephone direction of Maj. Nichols, and upon the faith thereof, claimant ordered certain tools, machines, and material necessary for the manufacture and delivery of said 1342 recoil mechanisms and made commitments therefor to the following persons, firms, and corporations:

Graton & Knight Manfg. Co., Worcester, Mass.....	Gaskets, washers, etc.
American Vulcanized Fibre Co., Wilming- ton, Del.....	Striker collars, etc.
Wheelock, Lovejoy & Co., Cambridge, Mass.....	Forged steel bars.
Edgar T. Ward-Sons Co., Boston, Mass.....	Bessemer steel rods.
Brown Bag Filling Machine Co., Fitch- burg, Mass.....	Various small hardware.

W. A. Jefft, Ashburnham, Mass.-----Packing boxes.
 Pratt & Whitney Co., Hartford, Conn.----Gauges.
 Hendey Machine Co., Torrington, Conn.---Lathe and oil tan.
 Railway Steel Spring Co.-----Springs, etc.
 W. A. Hardy & Sons Co., Fitchburg, Mass.---Bronze castings.
 The Fairbanks Co., Boston, Mass.-----Becker milling machines.

VI.

One of the items of claim arises from the purchase by claimant from National Acme Co., of Windsor, Vt., of a single-spindle belt-driven automatic for \$23,000. This machine was ordered September 10, 1918, and invoiced to claimant September 24, 1918, both of said dates being prior to the telephone conversations and preliminary interviews at Washington, D. C., upon which the claim of an agreement with respect to 1,342 recoil mechanisms is predicated.

VII.

No formal order or contract for the 1,342 recoil mechanisms or groups of any part thereof was thereafter tendered claimant. Claimant had assembled its material, or the greater part thereof, for the manufacture of said mechanisms when, shortly after November 14, 1918, it received the following letter from the Procurement Division, Office of Chief of Ordnance:

“WAR DEPARTMENT,
 OFFICE OF CHIEF OF ORDNANCE, PROCUREMENT DIVISION,
 Washington, November 14, 1918.

C. H. COWDREY MACHINE WORKS,
Fitchburg, Mass.

Subject: 1,342 Recoil Groups for 37-m/m tank gun, Model of 1918.

SIRS:

1. I am directed by the Chief of Ordnance to hereby withdraw the instructions given to you over the telephone by Maj. Nichols, with reference to 1,342 recoil groups for 37-m/m tank guns, model of 1916, until the formal procurement order for this material reaches you.

2. It is impossible to say definitely at the present time whether this order will be actually issued, and it is thought best not to incur any obligations in advance of its issue.

Respectfully,

ARTILLERY SECTION,
 GEO. R. NICHOLS, Jr.,
Major, Ord. Dept., U. S. A.
 By E. M. KERWIN,
Captain, Ord. Dept., U. S. A.

P. S. In the event that it is decided later not to purchase this material, you will be asked to advise what expense, if any, has been incurred and for which you should be reimbursed.”

(Stenographers' Minutes, pp. 8 and 9.)

VIII.

Immediately upon the receipt of the letter last mentioned, claimant endeavored to cancel its commitments set forth in finding V above. The Railway Steel Spring Co. and W. A. Hardy & Sons Co. agreed to cancel the orders placed with them and did accept cancellation. The other parties named had either delivered the articles contracted for to claimant or refused to cancel.

CONCLUSION.

I. There was an agreement within the purview of the act of March 2, 1919, between the United States of America, acting by Maj. George R. Nichols, Jr., Ordnance Department, and the claimant, C. H. Cowdrey Machine Works, entered into on or about October 10, 1918, whereby the said claimant agreed to manufacture and deliver to the United States of America 1,342 recoil mechanisms or groups for 37-mm. tractor guns provided for tanks, and the United States of America, through said Maj. George R. Nichols, Jr., agreed to pay claimant the reasonable value thereof.

II. The machine purchased from National Acme Co., as found in finding VI, was not so purchased upon the faith of said agreement.

DECISION AND DISPOSITION.

This Board will make a statutory award in accordance with this decision and transmit the same to the Claims Board, Ordnance Department, for appropriate action and payment.

Col. Delafield and Mr. Bryant concurring.

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Case No. 2189.

In re CLAIM OF THE WESTERN ELECTRIC COMPANY.

1. **OVERHEAD.**—Where the War Department Claims Board provides by resolution that the claimant company shall be entitled to recover overhead expenses “for the certain and definite period covered by the termination clauses in their agreements and during which, in accordance with the agreements, they would have been permitted to continue production” the resolution is within the powers conferred upon the War Department Claims Board by War Department G. O. No. 40 of 1919 and War Department Circular 26 of 1919, and claimant is entitled to overhead in accordance with the resolution.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$170,-217.67 for overhead expenses from the time of suspending work under certain Government contracts until such times as the claimant would have been entitled to continue performance under the contracts in accordance with the termination clauses. Held, claimant is entitled to recover.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This is a statement of claim, Form A, filed originally with the Claims Board, Signal Corps. It involves the determination of the appropriate period for the allowance of overhead during the suspension of certain formal and informal agreements entered into by the said company with the representatives of the Signal Corps, which call for an expenditure on the part of the United States of approximately \$4,371,000.

Settlement contracts providing for payment of all items except the said items of overhead and items of interest have been entered into between the parties and all amounts paid with the exception of the items stated. The claimant has declined to accept the offer of the Signal Corps Claims Board for overhead allowance and has appealed from the decision of the said Board on that item to this Board.

FINDING OF FACTS.

On March 28, 1919, the War Department Claims Board passed the following resolution:

“Resolved that in making settlement or adjustment contracts with the Western Electric Company, the Signal Corps shall be empowered to reimburse the Western Electric Co. for overhead charges

or loading as hereinbefore described for the certain defined period covered by the termination clauses in their agreements and during which, in accordance with the agreements they would have been permitted to continue production. This period, however, is to commence on the date on which the Western Electric Co. discontinued production, where such date was prior to the date of formal notice of termination of contract received from the Government, or from the date of formal notice of terminal from the Government where this date was prior to that on which production was discontinued by the Western Electric Company.

"The allowance for overhead for the period above described is not to include any of the items described in section 1, paragraph 2 of the letter of March 26, from the Western Electric Company to the Chief Signal Officer, and should not cover any charges for depreciation on factory buildings, machinery, equipment, or appurtenances to the plant.

"The allowance for overhead for the period above described is to be only that portion of the overhead which is directly attributable to the contracts which were terminated, and it is the intent of this resolution to make allowance for loss in overhead only with regard to operating, maintenance, and administration expenses such as are shown in paragraph 2, subparagraphs 2, 3, and 4 of letter from Western Electric Co., Inc., to Chief Signal Officer, dated March 26, 1919."

Attention is called to the words—

"for the certain defined period covered by the termination clauses in their agreements and during which, in accordance with the agreements they would have been permitted to continue production. This period, however, is to commence on the date on which the Western Electric Co. discontinued production, where such date was prior to the date of formal notice of termination of contract received from the Government, or from the date of formal notice of termination from the Government where this date was prior to that on which production was discontinued by the Western Electric Company."

A list of the procurement orders by number under which this question arises follows, with a description of the character of the execution of these agreements as determined by the Signal Corps Claims Board:

Procurement order No.	Date.	Date of formal termination notice.	Date production stopped.	Amount involved in contract.	Amount claimed for overhead expense.	Character of contract.
130247	8-17-18	12- 6-18	11-26-18	\$120,000.00	\$3,827.64	Informal: Regular in form but not formally approved.
130268	8-22-18	12- 6-18	11-26-18	57,500. 0	6,029.68	Formal No. S. C. 185.
130345	9-13-18	12-21-18	11-26-18	89,100.00	1,802.12	Informal: No contract received.
130350	9-13-18	12-12-18	11-26-18	392,550.00	5,198.52	Informal: No contract received.
130450	10-18-18	12-21-18	11-26-18	177,000.00	12,922.02	Informal: Regular in form but not formally approved.
130457	10-17-18	12- 6-18	11-26-18	6,500.00	176.52	Formal, No. S. C. 482 (see note).
130465	10-17-18	12-13-18	11-26-18	70,000.00	1,862.41	Informal: Letter from R. A. Klock, major, Signal Corps.

Procurement order No.	Date.	Date of formal termination notice.	Date production stopped.	Amount involved in contract.	Amount claimed for overhead expense.	Character of contract.
130497	10-26-18	11-30-18	11-26-18	\$37,500.00	\$2,526.16	Informal: Contract signed but not formally approved.
130500	10-28-18	11-26-18	11-26-18	16,675.00	1,161.31	Informal: Cont. signed but not formally approved.
130502	10-28-18	11-30-18	11-26-18	41,000.00	2,017.54	Informal: Signed but not formally approved.
130506	10-28-18	11-30-18	11-26-18	7,670.00	336.09	Informal: Signed but not formally approved.
130532	11-1-18	12-14-18	11-26-18	414,750.00	15,073.19	Informal: Signed but not formally approved.
130537	10-31-18	12-6-18	11-26-18	28,750.00	3,790.74	Formal, No. S. C. 553, Nov. 4. (See note.)
130535	11-5-18	11-30-18	11-26-18	621,000.00	24,561.50	Informal: Signed but not formally approved.
130538	10-30-18	12-9-18	11-26-18	516,000.00	19,218.97	Informal: Signed but not formally approved.
140273	8-22-18	12-11-18	11-26-18	54,000.00	19,862.22	Informal: Signed but not formally approved.
14354	9-19-18	12-13-18	11-26-18	418,000.00	6,217.17	Informal: No contract received.
14376	10-2-18	11-29-18	11-26-18	126,175.00	10,764.86	Formal No. S. C. 401, Oct. 7/18, approved Nov. 14, 1918.
14331	10-10-18	12-12-18	11-26-18	520,000.00	12,920.02	Informal: Telegram signed "Squier."
14335	10-14-18	12-3-18	11-26-18	28,500.00	2,676.75	Informal: Cont. signed but not formally approved.
150323	9-3-18	12-12-18	11-26-18	187,500.00	17,272.24	Formal No. S. C. 279, Sept. 28/18, approved Oct. 17/18.
Total.....				4,225,147.50	170,217.67	

NOTE.—Procurement Order No. 130457 covered by contract S. C. 482, Oct. 24, 1918. Procurement Order No. 130537 covered by contract S. C. 553, Nov. 4, 1918.

The Signal Corps Claims Board has determined in substance that the appropriate period for overhead allowance is the period from the day the contractor actually stopped work to and including one day after "the date of preparation in the office of the Chief Signal Officer of a notice of termination of this order." (Signal Claims Board minutes June 11, 1919.)

The War Department Claims Board empowered the Signal Corps in substance to reimburse the company for the period covered by the termination clauses in the agreements during which, in accordance with the agreement the company would have been permitted to continue production.

The procurement orders specified above stated that a definite contract of a certain number would follow, which it was agreed should constitute the formal contract between the parties. These forms of contract so numbered contained a 20 or 60 day termination clause as follows:

"ARTICLE 10, SECTION 2. Termination in public interest. If in the opinion of the chief of the bureau the public interest shall so require this contract may be terminated by the United States by _____ day's notice in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of _____ days after the giving of such notice, and shall be without prejudice to any claims which the United States may have against the said contractor under this contract. After receipt

of such notice the contractor shall not order any further materials or facilities, or enter into any further subcontracts, or make any further purchases in connection with the performance of this contract, without written consent previously obtained from the contracting officer * * *. In the event of and upon such termination of this contract prior to completion, as provided in this section 2, for any reason other than the default of the contractor, the United States shall make payments to and protect the contractor as follows: (a) the United States shall pay to the contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with requirements of this contract at the date such termination becomes effective. (b) The United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expenditures for plant, facilities, and equipment solely provided for the performance of this contract) made by the contractor in good faith in connection with the performance of this contract as are fairly and properly apportionable to the articles or work, the delivery or performance of which is so terminated, plus fifteen per cent of the amount so ascertained. * * * (a) The United States shall protect the contractor against such proportion of the contractor's outstanding obligations, incurred by the contractor in good faith in connection with the performance of this contract, as is properly and fairly apportionable to the articles or work, the delivery or performance of which is so terminated."

It appears that the contractor ceased work at the request of the United States very soon after the armistice; action on its part which was much more advantageous to the United States and less advantageous to itself than action under the termination clauses would have been.

DECISION.

By War Department Circular No. 26, January 20, 1919, the War Department Claims Board was given authority to supervise and coordinate the work of the various War Department agencies engaged in the settlement of claims resulting from the termination of contracts or other procurement obligations consequent upon suspension of hostilities and to authorize and approve such settlements.

Pursuant to the act of March 2, 1919, the Secretary of War by G. O. 40 (1919) has invested the War Department Claims Board with power to determine a fair and equitable basis upon which informal agreements may be adjusted, and to exercise all powers conferred upon the Secretary of War by the act of March 2, 1919, except such powers as are conferred by that order on the United States Liquidation Commission and the Imperial Munitions Board.

The power to determine the appropriate period during which compensation for overhead expense shall be allowed under formal and informal agreements suspended at the request of the United

States is clearly within the powers and duties conferred on the War Department Claims Board by the aforesaid circular and order.

The empowering of the Signal Corps Claims Board by the War Department Claims Board to make the allowance on the basis stated above (resolution of March 28, 1919) constitutes a determination by the latter Board that such basis is a fair and equitable basis (act of March 2, 1919, G. O. 40, 1919), and is also due exercise of the authority to supervise and to coordinate and approve settlements of formal contracts. (W. D. Circular 26, 1919; *Corliss Co. v. U. S.* 321.) The War Department Claims Board has power to make the disposition of this question set forth in its resolution of March 28, 1919, with regard both to formal and informal agreements. This Board regards the resolution by the War Department Claims Board of March 28, 1919, as a due determination by the authority having jurisdiction of the question involved in this controversy. This Board should proceed to determine the matter upon the papers presented, in accordance with the said resolution. (Supply Circular No. 46, 1919.)

DISPOSITION.

The papers herein, with a copy of this decision, will be transmitted to the award section of this Board for the ascertainment and payment of the amount due the contractor under the said resolution of March 28, 1919.

Col. Delafield and Mr. Montgomery concurring.

Case No. 2190.

In re CLAIM OF THE WESTERN ELECTRIC COMPANY.

1. **INTEREST.**—A resolution of the War Department Claims Board of February 19, 1919, authorizes the allowance of interest on capital "tied up" in articles of process and from the time of suspension to date of settlement.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for interest "tied up" from the time of suspension until the time of settlement. Held, claimant is entitled to recover.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This is an appeal from the decision of the Claims Board, Signal Corps, which denied the claimant interest on raw materials acquired by the contractor for the performance of certain agreements specified therein in a quantity not exceeding the requirements for the completion of the contract. It appears from the papers herein that it has been determined that none of the said agreements have been executed in the manner prescribed by law, and that they are all within the provisions of section 1 of the act of March 2, 1919.

FINDINGS OF FACT.

A statement is contained in the papers showing the order numbers of the agreements under which interest on raw material is claimed, their dates, dates of termination, cost of raw material on hand at date of termination, date final cost statement submitted, interest period, number of days, and the amount of interest claimed.

All these agreements were terminated in the public interest prior to completion, and awards have been executed and approved by the Signal Corps Claims Board, leaving undetermined only the questions of interest involved in this statement of claim and certain questions with regard to overhead involved in Western Electric Co. claim No. 150-C-2189. The settlement contracts were more advantageous to the United States than the terms provided in the termination clauses in such agreements as contain termination clauses.

The Air Service Board rejected the said claims for interest "as not allowable under the policy established by the Signal Corps Claims Board."

DECISION.

The Secretary of War is authorized to pay, adjust or discharge any such agreement upon a fair and equitable basis, provided that no award shall include prospective profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order.

Pursuant to this authority the Secretary of War by G. O. 40 (1919) has invested the War Department Claims Board with power to determine a fair and equitable basis upon which such agreements may be adjusted, and to exercise all other powers conferred upon the Secretary of War by the act of March 2, 1919, except such powers as are conferred by that order on the United States Liquidation Commission and the Imperial Munitions Board.

Pursuant to this authority the War Department Claims Board adopted the resolution set forth in Supply Circular 17, March 3, 1919, which provides in part as follows:

* * * "The Bureau Claims Board are hereby authorized and directed to proceed on the basis of the agreement thus established to make detailed examination of the claim and to recommend a fair and equitable basis for the payment or discharge thereof. For that purpose, so far as consistent with this or subsequent instructions of the War Department Claims Board, the Bureau Claims Board may make use of the machinery and procedure which has heretofore been established for the negotiation of settlement agreements on properly executed contracts which have been suspended or reduced."

By Supply Circular 19 (Mar. 6, 1919), section 5, page 3, attention is called to a resolution of the War Department Claims Board, dated February 19, 1919, in part reading as follows:

"The adjustments offered by the Department (under S. C. 111, 1918) should in general provide for reimbursement to the contractor of such expenditures properly incurred (i. e., expenditures not resulting in a finished product) with a reasonable remuneration for the use of the capital and service of the contractor in that part of the performance under the contract which does not result in finished products * * *. To fairly compensate him for his investment made in raw materials not in process, he should be allowed, in addition to the cost-plus inward handling charges plus such proportion of overhead as is directly applicable, *compensation for use of his capital tied up in such material at the rate of 6 per cent per annum, or, if the capital is borrowed, at the rate of interest which he pays for it*, where the Board has satisfied itself that such compensation is not included in the claim as carrying charges or otherwise and has not been taken into consideration in fixing the percentage of allowance under Supply Circular 111, paragraph 5" * * *

Under this authority many thousands of adjustments have been recommended by the Ordnance Claims Board, Claims Board of the Office of the Director of Purchase, and other bureau boards, which have included the allowance of interest in the case stated, as well under informally executed agreements as under duly executed contracts. Such recommendations for settlement, including the allowance of interest in such case, are clearly authorized by the resolution quoted, and it has been the policy of the War Department Claims Board to approve them and thus make the adjustment and payment on behalf of the Secretary of War.

The policy of the Claims Board, Signal Corps, declared in this case with regard to interest on raw materials, is in conflict with the policy declared by the War Department Claims Board, the authority having power in the premises. It is the duty of the Signal Corps Claims Board to act in accordance with the resolution of February 19, 1919, so long as that resolution remains in force.

The said resolution authorizes the allowance of interest for capital "tied up in such material." The language used authorizes interest during the period capital is thus "tied up." The claimant is willing to accept interest from the date of suspension to the date upon which its final cost statement was rendered. If the capital was tied up in such raw materials during the said period, no exception can be taken to its demand in this respect and interest should be allowed accordingly.

DISPOSITION.

The papers herein will be transmitted to the award section of this Board for the ascertainment of the amount of interest due the claimant as indicated by this opinion, and for such further action as will accomplish the payment of the amount ascertained.

Col. Delafield and Mr. Montgomery concurring.

Case No. 344.

In re CLAIM OF THE SHOEMAKER CO.

1. **PURCHASE ORDERS FORMAL CONTRACT.**—Where four separate purchase orders for hay, each amounting to less than \$25,000, to be delivered within 30 days, were given to and accepted by claimant, there is a formal contract, and a claim alleged to be based upon them is not a claim within the purview of the act of March 2, 1919.
2. **LATE DELIVERIES—EXCUSE FOR.**—Where a contractor fails to deliver according to the terms of the contract, the Government has a right to cancel the contract by reason thereof, and the contractor's excuse that the reason it failed to deliver was that it used the hay to fill other Government orders will not avail claimant.
3. **CLAIM AND DECISION.**—Claim is made for \$5,784.25, loss alleged to have been sustained on four formal purchase orders for hay, which orders were cancelled by the Government for failure to deliver. Held, claimant is not entitled to recover.

Mr. Bayne writing the opinion of the Board.

These are four separate claims aggregating \$5,784.25, arising under four different purchase orders for hay issued by the Quartermaster Corps in Chicago, Ill., which were cancelled for failure, as alleged by the Government, to deliver the hay in the time specified in the orders.

There has been no hearing on the claims.

This Board finds the following to be the facts:

FINDINGS OF FACT.

1. Claimants are a partnership composed of William Shoemaker and Florian W. Shoemaker, dealers in hay, grain, produce, and general merchandise at Oakwood, in the county of Cayuga, N. Y., carrying on business under the firm name of The Shoemaker Co.

2. On or about September 23, 1918, the Forage Branch, Subsistence Division, O. Q. M. C., Lytton Building, Chicago, Ill., issued to claimants purchase order No. 0639, dated September 23, 1918, for 600 tons of timothy hay, No. 2 or better, at \$25.10 per ton, total amount of order \$15,060, at points taking 27 cents rate to New York City, to be delivered within 30 days to the Quartermaster, Animal Embarkation Depot, N. Charleston, S. C. The order was signed by John Roberts, Major, Q. M. C.

3. On or about September 24, 1918, the Forage Branch, Subsistence Division, O. Q. M. C., Lytton Building, Chicago, Ill., issued to claimants purchase order No. 0742, dated September 24, 1918, for

240 tons of No. 1 light clover mixed hay at \$27 per ton; total amount of order \$6,480, at York State loading stations taking 22½ cents rate to New York City, to be delivered in 30 days to the Quartermaster, Animal Embarkation Depot No. 301, Camp Hill, Newport News, Va., for local use. This order was also signed by John Roberts, Major, Q. M. C.

4. On or about September 24, 1918, the Forage Branch, Subsistence Division, O. Q. M. C., Lytton Building, Chicago, Ill., issued to claimants purchase order No. 0743, dated September 24, 1918, for 240 tons of standard or better timothy hay at \$27 per ton, total amount of order, \$6,480, at York State loading stations taking 22½ cents rate to New York City, to be delivered within 30 days to the quartermaster, Animal Embarkation Depot No. 301, Camp Hill, Newport News, Va., for local use. This order was also signed by John Roberts, Major, Q. M. C.

5. On or about September 24, 1918, the Forage Branch, Subsistence Division, O. Q. M. C., Lytton Building, Chicago, Ill., issued to claimants purchase order No. 0744, dated September 24, 1918, for 300 tons of No. 2 or better timothy hay at \$26 per ton, total amount of order, \$7,800, at York State loading stations taking 22½ cents rate to New York City, to be delivered in 30 days to the quartermaster, Animal Embarkation Depot No. 301, Camp Hill, Newport News, Va., for local use. This order was also signed by John Roberts, Major, Q. M. C.

6. None of these purchase orders were signed by claimants.

7. The claim under each order is made by a separate petition, all verified the same day, July 30, 1919, and filed with this Board on the 30th day of August, 1919. The claims aggregate \$5,784.25, as follows: Under Order No. 0639, \$1,072.08; under Order No. 0742, \$2,118.13; under Order No. 0743, \$740.72; under Order No. 0744, \$1,853.32.

8. Claimants failed to deliver any hay under Order No. 0639, or under Order No. 0742, or under Order No. 0743, or under Order No. 0744, within the respective times specified in said orders and for that reason the Quartermaster's Department refused to accept after that time any of the hay specified in the orders, and through Mr. George S. Bridge, who was then Chief of the Forage Branch of the Subsistence Division of the War Department at Chicago, Ill., notified claimants by telegrams and letter that the orders were cancelled on the following dates:

Order No.	Date of telegram.	Date of letter.
0639.....	Nov. 6, 8, 1918	Nov. 7, 1918
0742.....	Nov. 15, 1918	
0743.....	Nov. 15, 1918	
0744.....	Nov. 15, 1918	

9. In explanation of failure to deliver the hay in the time specified in the orders, claimants allege that the hay was not delivered on time because at the request of Mr. Bridge, they had diverted the hay called for by the orders to be furnished on emergency contracts on which the War Department required immediate delivery and petitioners were accordingly unable to get other cars of hay in time to fill the orders in question.

10. There is no evidence to show that the hay which claimants so delivered upon the request of Mr. Bridge was not fully paid for by the Government. At any rate claimants do not make any such claim.

11. It thus appears that claimants, in order to comply with the request of Mr. Bridge, according to their own statement, disqualified themselves from fulfilling the said purchase orders without any notice to Mr. Bridge that such would be the effect of complying with his request or without release by him or anyone else acting for the Government, from complying with the said purchase orders.

12. When these claims came to this Board, Col. Christopher B. Garnett, then chairman of the Board, forwarded all papers in connection with the claims to the Claims Board, Office of the Director of Purchase on May 20, 1919, because, as he stated:

"The claim is based on the cancellation of four written contracts, namely: Nos. 0743, 0742, 0744, 0639. It is therefore deemed a class A claim and is being forwarded for such action as the Claims Board, Director of Purchase, may deem proper."

13. On June 30, 1919, the Claims Board, Office Director of Purchase, returned these claims to the Board of Contract Adjustment on the ground that as they were based on four purchase orders for the purchase of hay, each less than \$25,000 in amount and for delivery in 30 days, they would therefore not seem to be based on an informal contract but on a dispute arising out of the valid agreement.

14. The Government having refused to take the hay because of the failure of claimants to deliver it within the times specified in the several orders, claimants sold the hay and by the claims filed, seek to recover the difference between the cost of the hay and the amounts received on the sale.

15. These orders appear to have been executed in accordance with the regulations of the Quartermaster General's Office in force on their respective dates.

DECISION.

I. The orders in question having been accepted by claimants, and requiring deliveries within 60 days, come under the designation of formal contracts executed in accordance with the law, and so are not agreements contemplated by the Dent Act of March 2, 1919.

2. The contracts being broken by claimants, in not making the deliveries within the times specified, and thereafter notice of cancellation on behalf of the Government having been given to claimants, claimants make claims under contracts broken by them.

3. In such cases the Secretary of War has no jurisdiction.

4. The claims should be dismissed and an order made denying the relief prayed for by claimants.

DISPOSITION.

An order should be made denying the relief prayed for by claimants in their statements of claim and dismissing the claims.

Col. Delafield and Lieut. Col. Carruth concurring.

Case No. 2207.

In re CLAIM OF DISCO ELECTRICAL MANUFACTURING CO.

1. **IMPLIED CONTRACT.**—Where claimant was instructed by Government officers to manufacture a certain number of synchronizers, and claimant proceeded to comply with the instructions and in so doing made expenditures, there was a contract under the act of March 2, 1918.
2. **CLAIM AND DECISION.**—Claim made on Form B. Held, claimant entitled to relief.

Lieut. Col. Carruth, writing the opinion of the Board:

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1918, and statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$3,367.30, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. It appears that Capt. Frank H. Wilson, of the Detroit Air Service District, received instructions from the Production Division of the Air Service, Washington, D. C., under date of November 4, 1918, to purchase 600 synchronizers for the British Government. Upon receipt of this instruction Capt. Wilson immediately telephoned Mr. Hegelstein of the claimant company, the Disco Electrical Manufacturing Co., of Detroit, Mich., requesting that he immediately prepare to furnish the 600 synchronizers. This telephone conversation was later confirmed by a letter under date of November 15, 1918. The claimant was urged to rush the fulfillment of this order, as the British Government was demanding immediate shipment.

3. After the armistice was signed the British Government, through its representative, gave notice that it would not require the 600 synchronizers, and thereupon under date of November 21, 1918, Capt. Wilson ordered the claimant to cease manufacturing same.

4. This claim is for the completed work on 441 of the 600 synchronizers ordered, and is set out as follows:

441 British standard pump supports at \$7.18-----	\$3, 166. 38
Labor, 293½ hours at \$1.50 per hour-----	439. 87
	<hr/> 3, 606. 25
Less sale of scrap authorized by Capt. Wilson-----	238. 95
	<hr/> 3, 367. 30

5. It further appears that the claimant had a large number of synchronizers of the American type on hand and it was instructed by the Government's agents to change this American type so that it would meet the British requirements, and thus expedite delivery of same to the British Government. This claim was carefully audited and passed on by the Detroit Air Service District Claims Board, and also by the Air Service Claims Board at Washington. These boards approved the statement of claim, but were unable to make settlement in view of the fact that the claim was found to be a class B claim and was thus referred to this Board for proper decision.

DECISION.

1. It is clear from the record that this claimant was given an oral order by duly authorized agents of the Government on or about November 5, 1918, to manufacture 600 synchronizers; that the claimant proceeded in good faith immediately to manufacture these synchronizers and had partially completed the order when it was instructed to cease manufacturing same. The Board is of the opinion that there was an informal agreement within the meaning of the terms of the Dent Act, whereby this claimant is entitled to an adjustment of its claim.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Air Service Claims Board for appropriate action.

Col. Delafield and Mr. Bayne concurring.

Case No. 2253.

In re CLAIM OF TWENTIETH CENTURY STAMPING & TOOL WORKS.

1. **RECOMMENDATION OF AWARD.**—Where a negotiating officer informs a contractor that he has recommended the awarding of a contract but warns against going ahead before receipt of the contract, there is no agreement within the purview of the act of March 2, 1919. This is true even if there is a representation of the great need for the article which is the subject of the proposed contract.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for the value of materials and facilities purchased in expectation of receiving a contract for the manufacture of forks. Held, claimant is not entitled to relief.

Mr. Harding writing the opinion of the Board.

This claim comes to us from the Claims Board, Office of Director of Purchase, having been filed with that Board June 2, 1919. The claim is made as under class B, and is for the sum of \$894.50.

FINDINGS OF FACT.

1. During the spring and early summer of 1918, Jacob M. Roth, doing business under the name of Twentieth Century Stamping & Tool Works, had a contract with the Government for the manufacture of a large amount of bacon cans, and was about to complete the contract, having left on hand a certain amount of pig tin, and the Government concluded that it would abandon the further manufacture of bacon cans. The claimant then came to Washington with the intention of securing orders for contracts for mess equipment. This was about the middle of August, 1918. He had a conference with Capt. Warren Ordway, who was at that time procurement officer of the Ordnance Branch and in the Inspection Division of the Equipment Branch, and applied to him for such orders. Capt. Ordway said to the claimant that the Government was in great need of forks and spoons, and the claimant requested permission to make a bid to furnish them. Capt. Ordway gave him blue prints and specifications and all necessary information from which to make bids. At the same time claimant made a verbal bid for furnishing the forks, which was a low bid. Capt. Ordway did not tell the claimant to proceed with the manufacture in advance of the acceptance of his bid, if any bid should be made. On the strength of this conversation with Capt. Ordway, and in the latter part of August or the

first part of September, the claimant purchased, as he testified, a considerable amount of tin, on the resale of which he lost \$188.40.

2. About August 23 the claimant put in his bid in writing, offering to fill an order for the Government for 1,000,000 forks at a fixed price. The bid was probably received in Washington on August 25 or 26, and came to the attention of Lieut. Hunter, who belonged at that time to the Ordnance Department. Lieut. Hunter advised claimant to wait until after the transfer with reference to mess equipment should be made to the Purchase, Storage & Traffic Division, which was then in contemplation. About September 1, after putting in the written bids, the procurement of mess equipment was in fact transferred to the Purchase, Storage & Traffic Division, at which time Lieut. Hunter was made negotiating officer for mess equipment. Some time in September, 1918, the claimant had an interview with Lieut. Hunter with reference to the bids which he had put in, and Lieut. Hunter recommended to him that he make a bid on the basis of 500,000 forks instead of 1,000,000, and the claimant did so. At the same time he advised the claimant that in the Purchase, Storage & Traffic Division there were explicit orders that negotiating officers should not advise bidders to proceed, no matter how urgent the case, until formal contracts had been passed by the Board of Review. There was also a conversation some time early in September, during which Lieut. Hunter said substantially the same thing to the claimant.

On November 1, Lieut. Hunter recommended that a contract should be awarded to the claimant for the manufacture of 334,833 forks, and told claimant that the contract would probably go through, and about the same time told the claimant that he must proceed cautiously, because the Division of Purchase, Storage & Traffic would not recognize anything but written contracts. On the strength of this conversation with Lieut. Hunter, and before obtaining any contract, the claimant bought a certain rolling machine, upon the resale of which he lost, so far as these forks are concerned, \$406.10, making his total claim \$894.50. This rolling machine was purchased in October, 1918.

3. The recommendation for a contract was sent through by Lieut. Hunter about the 1st of November, 1918, but never had the approval of the Board of Review, and before the contract was approved by the Board of Review, or released by that board, the armistice came and no further proceedings were taken.

DECISION.

1. We are fortunate in this case because there is no substantial difference between the testimony of the claimant and the Government witnesses. Capt. Ordway testified that the only conversation he had

with the claimant on this subject was in August, 1918; that he told the claimant that the Government was in very urgent need of forks, and that a contractor was being sought who could manufacture them economically as well as quickly, and that claimant was the logical contractor. He also testified that he gave the claimant blue prints and specifications, but because the negotiations at that time had not proceeded far enough, and inasmuch as they had not yet received any bids, he did not go so far as to tell the contractor to proceed to manufacture in advance of the acceptance of his bid. Soon after that he left for France, and had no more to do with it. The Government witness, Lieut. Hunter, testified to the effect that after this business had been transferred to the Purchase, Storage and Traffic Division, and on or about September 1, or a little later, he advised the claimant to put in a bid on the basis of one-half million forks instead of a million, and that he did not tell the claimant to proceed with reference to this contract before getting a contract, and that there were explicit rules in the Purchase, Storage and Traffic Division that they should not tell contractors to proceed, no matter how urgent the case was; that in every case, as a negotiating officer, he tried to make it clear to bidders that he could only make recommendations, which were subject to the approval of the Board of Review; that he tried to make this clear to the claimant both in September and in October of 1918, but that he did tell the claimant that he would recommend him for a contract, which would have to be passed on by the Board of Review, and that he could see no reason why it should not go through; and that about the 1st of November he did make recommendations that a contract be awarded to claimant for the manufacture of 334,883 forks; and that it was his (Hunter's) understanding that the claimant had on hand a certain amount of pig tin left over from his bacon-can contract which he could use on account of the contract in question.

The testimony of the claimant is not far different. His testimony is to the effect that he came down to Washington about the middle of August, and that Capt. Ordway then gave him blue prints and specifications on forks and spoons; that he submitted his bid verbally to Capt. Ordway on the 18th or 20th of August, 1918, and later confirmed it in writing on August 23, 1918. That about that time the mess kit equipment was to be transferred from the Ordnance Department to the Purchase, Storage and Traffic Division, and Capt. Ordway left for France about that time. He testified:

"I had practically no understanding, but I was confident that an order was coming through for spoons and forks; and previously, that is on the previous contracts I had for bacon cans, I experienced considerable difficulty in getting tin. At that time when I was down here negotiating for contracts for forks, I was in a position to buy

tin, and with the idea that I was going to get this contract, I bought as much as I could possibly get, that is with a view of having some tin on hand so that I would not be hampered in executing this contract for forks if it was going through. Later on when this was transferred to the Purchase, Storage & Traffic I came here and saw Lieut. Hunter, in October, I believe. Lieut. Hunter gave me to understand at that time that they had a different procedure in this division, and they had regular printed forms to bid on. He asked me to make out one of these printed forms and make a bid on one-half million rather than a million to give me a start until I could get into this proposition; it would take some time on a new article to get right into it and find out what you are actually able to do. * * * Lieut. Hunter at that time gave me to understand to go ahead carefully on this because things looked at that time that the war was coming to an end. He said to me, 'In the event you have not a formal contract on this and the armistice would be signed, there would be no law that would enable you to get any compensation for any work you had done.' In spite of the warning that Lieut. Hunter gave me at the time, I acted in good faith and simply went ahead with the work in case that the thing should come to an end and there was no law at that time or no law would be enacted—I simply forgot about it."

Mr. Roth also testified that he bought the tin upon which he is claiming a loss on the conversation he had with Capt. Ordway, and that he bought the machine for which he is claiming a loss in October on the strength of his conversation with Lieut. Hunter.

As we have above said, the recommendation was made that a contract be awarded the claimant, and it should take its regular course. It was submitted to the Board of Review, which declined to approve it and refused in writing to either approve or release it.

2. It appears to us that no contract, either express or implied, arises out of the testimony, even if taken in its most favorable aspect for the claimant.

The claim is disallowed.

A copy of this decision should be sent to the Claims Board, Office of Director of Purchase, which has before it a spoon contract arising out of the same conversations, but which resulted in a contract, signed and delivered.

Col. Delafield and Mr. Hunt concurring.

Case No. 1715.

In re CLAIM OF PHILADELPHIA SUBURBAN GAS & ELECTRIC CO.

1. **FACILITIES.**—Where claimant, owning and operating a gas plant at Philadelphia, believed that the prosecution of the war would call for more gas than claimant's company was capable of supplying, and accordingly started to increase its facilities, it having been suggested to claimant by the Chief of the Plant Facilities Section that possibly the War Finance Corporation would assist claimant financially, there is no agreement on the part of the Government to reimburse claimant for expenses so incurred.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$2,112.15, loss sustained by a gas company on cancelling orders for the increase of its plant. Held, claimant is not entitled to recover.

Mr. Hamilton writing the opinion of the board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 for \$2,112.15, damages alleged to have been sustained by the Philadelphia Suburban Gas & Electric Co., of West Washington Square, Philadelphia, Pa., by reason of an agreement alleged to have been made by claimant with the Government during the month of June, 1918, for the construction of facilities to increase its output of illuminating gas.
2. In anticipation of increased requirements of illuminating gas due to the expansion of war industries in the district served by it, the claimant adopted a project for increasing its facilities and, late in 1917, placed orders for the necessary machinery and equipment. Having encountered difficulty in arranging for the financing of this project, the claimant shortly thereafter cancelled all orders for machinery and equipment without sustaining any loss by so doing.
3. During the latter part of May, 1918, or early in June, the claimant again decided to proceed with the project of increasing its facilities and again placed the necessary orders for machinery and equipment. Shortly thereafter the claimant decided to abandon this project and requested the sources of supply to suspend operations under the orders until it had a chance to further consider the advisability of the contemplated expansion. At about this time the vice president of the company, Mr. Stroud, talked with Mr. Isaac M. Francis,

chief of the plant facilities section, Production Division of the Philadelphia office of the Chief of Ordnance. Knowing of the greatly increased requirements of gas by plants engaged in the production of Ordnance matériel, Mr. Francis suggested that the War Finance Corporation, an agency of the Treasury Department, might possibly be induced to assist the claimant in financing this expansion and offered to investigate and use his best efforts to arrange for such assistance.

4. The claimant alleges that upon the faith of Mr. Francis's expressed willingness to solicit the aid of the War Finance Corporation, it notified its sources of supply of machinery and equipment to proceed with the performance of the suspended orders.

5. Sometime thereafter the claimant again cancelled its orders, with the result that upon its machinery order a claim has been presented on account of which it now asks protection. Because of its desire to retain the good will of the present claimant, the machinery company has agreed to accept 50 per cent of the amount of the claim in full settlement, and, accordingly, the present claim is reduced to \$1,056.08.

6. It is clear that the Government recognized the need for a supply of gas in the claimant's district in excess of the capacity of the claimant's existing facilities. Independent of the conversation by the claimant with Mr. Francis, the Ordnance Department had under consideration a plan under which it might have directed one or more of its subcontractors to arrange for an additional supply, possibly with the present claimant. The execution of such a plan might have involved an increase of facilities similar to that included in the claimant's original project. The Ordnance Department did not discuss this plan with the claimant nor was it ever adopted or acted upon.

DECISION.

1. It is not within the province of this Board to speculate as to what action the Government would have taken to insure an adequate supply of illuminating gas beyond the capacity of the present claimant.

2. It is entirely clear that no contract was ever entered into by the Government with this claimant looking to the execution of the project for an increased capacity, and the claimant, upon the hearing, conceded the absence of any such contractual relations with the Government.

3. The claim was presented for the consideration of this Board in good faith, but upon a misunderstanding of the limitations of the act of March 2, 1919, and the Board is unable to find that the claimant has shown cause justifying an award in any amount.

Col. Delafield and Mr. Patterson concurring.

Case No. 480.

In re CLAIM OF CRANE & MacMAHON (INC.).

1. **INFORMAL CONTRACT.**—Where claimant seeks payment for expenditures made in purchasing materials to perform an alleged informal contract and to establish the contract relies upon statements made by officers and civilian agents of the Government to the effect that claimant had received or would receive an order for artillery wheels, and the claimant well knew that such persons had no authority to contract and that their statements were merely expressions of opinion, there was no contract made within the provisions of the act of March 2, 1919, to reimburse claimant for said expenditures.
2. **CONFLICT BETWEEN WITNESSES.**—Where only two witnesses testified to the transaction, and their testimony was in direct conflict, surrounding facts and circumstances will be examined for the purpose of determining which witness is corroborated.
3. **CLAIM AND DECISION.**—Claim is made on Form A, but treated as though filed on Form B, and is based upon an alleged informal contract under the act of March 2, 1919, for the manufacture of artillery wheels. Held, that claimant is not entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A (but treated herein as though properly filed on Form B), has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$14,551.22.
2. The claim of \$14,551.22 is made in this case on account of woodstock, consisting of spokes and rim strips for wheels, purchased by claimant in preparation to perform a prospective Government contract to manufacture five thousand 56-inch artillery wheels. The legal name of the claimant company is Crane & MacMahon (Inc.); its trade name is the St. Marys Wheel & Spoke Co. The St. Marys Wheel & Spoke Co. is consolidated with Crane & MacMahon (Inc.). These concerns are engaged in the manufacture of wooden wheels. Mr. Thomas W. White is the president of Crane & MacMahon (Inc.), and formerly the sole owner of the St. Marys Wheel & Spoke Co. Mr. White was also the chairman of the

wheel manufacturers' war service committee, whose function it was to ascertain what concerns could best manufacture wheels for the Government and to make recommendations to the Government. He was in close touch with the War Department and fully understood the methods pursued by the various department agencies in recommending and awarding Government contracts. His factory was working almost entirely on Government wheel contracts.

3. On August 22, 1918, Maj. James Guthrie, Engineering Division, Ordnance Department, who had no power to contract, but whose duty it was to draw plans and make specifications for Ordnance requirements, visited the St. Marys Wheel & Spoke Co.'s plant (hereinafter called the St. Marys Co.) and was informed by Mr. White that he had decided to discontinue purchasing woodstock for artillery wheels as he had a sufficient quantity for the orders on hand. Mr. White testified that Maj. Guthrie replied that the War Department would soon be placing additional orders for wheels and from the report he would make the St. Marys Co. was sure to get its proportion, and it would be wise to continue to produce woodstock for wheels. Maj. Guthrie testified that if he made any such statement, it was merely an expression of personal opinion, as he had no authority to contract. Soon after this conversation the St. Marys Co. placed orders for additional woodstock both for 56-inch and 60-inch wheels.

4. On September 13, 1918, Mr. White, as chairman of the Wheel Manufacturers' war service committee, made a tentative allocation of artillery wheels to various concerns, of which the St. Marys Co. was one, and recommended to the Procurement Division, Ordnance Department, that the St. Marys Co. be given a contract on order for some 60-inch wheels, and also an order for 10,000 56-inch wheels out of a total of 60,000 required. By letter of September 24, the artillery section of the Procurement Division, Ordnance Department, requested bids for 56-inch wheels in lots of 5,000. The St. Marys Co. submitted a bid by letter dated September 30, 1918, quoting a price of \$32.40 a wheel. This letter also contained the following:

"3. Deliveries to begin as soon as our present order CF-371 is out of the way, about March, 1919, and continue at the rate of 2,000 wheels per month; 10,000 wheels to be delivered on or before October 1st, 1919.

"4. As we informed you by letter under date of the 20th, we would like an additional order for the 60-inch wheels, which we are now manufacturing under CF-371, or some heavier wheel taking a 3-inch spoke, to go with these 56-inch, as the procurement of raw material in white oak and hickory can be more easily done with two sizes for our mills to work on rather than one, and as we have ad-

vised you by letter, we have on hand a surplus of material for these wheels as follows:

"For the 56-inch wheel—

"24-inch spoke, 64,400 pcs., sufficient for 4,025 wheels.

"Rim strips, 9,000 pcs., sufficient for 4,500 wheels.

"For the 60-inch wheel—

"3-inch spoke, 61,600 pcs., sufficient for 3,850 wheels.

"Rim strips, 1,700 pcs., sufficient for 850 wheels.

"5. We would like to be favored with your order or know positively if we are to get the same as early in October as possible, as the quotation made to us on the high-carbon tire expires by limitation under date of October 30."

5. On October 31, 1918, Mr. White called at the Procurement Division to inquire about his bid. He saw Capt. Arthur Day, who was in charge of wheel-purchasing contracts for the Procurement Division of the Office of the Chief of Ordnance, and with whom Mr. White had had repeated prior dealings. Mr. White testified that Capt. Day said the bid was too high, so he revised his bid to \$32, and Capt. Day then said to him, "This puts the matter in shape now, so I can give you an order when it is ready to place."

Mr. White has also submitted an affidavit in which he alleges that Capt. Day told him at this conference: "I can not place the order to-day, as I do not know the exact number it will be necessary to buy * * * but whatever the amount is, you will get the order in a day or so." These statements are directly and positively contradicted by Capt. Day, who testified that he made no such remarks. Capt. Day testified that he told Mr. White that it was the decision of Maj. Nichols, his superior officer, and himself, that under no circumstances would the St. Marys Co. receive any part of the present award of contract for 56-inch wheels, because that company had been behindhand on the contract for 56-inch wheels which it then had, while other concerns had been prompt on deliveries, and hence he was going to favor the other concerns with the new contracts. Capt. Day, however, informed Mr. White that he would be given an order for 60-inch wheels, as the St. Marys Co. had made good on their former 60-inch wheel contract. Claimant obtained order for 60-inch by amendment to its existing contract; that contract has been settled, so it is not involved in the claim. These facts are noted because confusion may have existed in some of the witnesses' minds between the prospective orders for the 60-inch and 56-inch wheels which were being considered at the same time.

6. On the evening of the same day (October 31) an informal meeting was held at the Raleigh Hotel, Washington, for the general purpose of discussing wheel production for the Army. At this meeting the following were present: Mr. White, representing the Wheel

Manufacturers' war service committee; Mr. E. F. Parsonage, chief of the vehicle section, War Industries Board; Maj. James Guthrie, of the Engineering Division, Ordnance Department; and Mr. O. B. Bannister, a woodstock expert of the Ordnance Department. None of these gentlemen had power to make contracts for the Government, as claimant well knew. Mr. White told them that he considered the statement which Capt. Day had made to him that morning amounted to an order for 56-inch artillery wheels, and asked their advice as to what he should do in reference to the option which he had with the Firestone Steel Products Co. for iron wheel tires for 56-inch wheels, which expired that day. Thereupon Maj. Guthrie answered:

"Consider you have an order to go ahead and close up on these tires and get such materials as you require."

Maj. Guthrie denied on the witness stand that he said, "Consider you have an order and close up on tires and woodstock." (Record, p. 68.) Mr. Bannister answered:

"I learned to-day that you are going to get that order. You are perfectly safe in going ahead and getting this material."

Mr. Parsonage answered:

"There is a clearance on an order for you going through my office this week and it is for 8,000 wheels."

A copy of a conditional clearance order is appended to the record. It states that the order was "cleared by the section head" on October 24, "subject to special restriction (as noted)," and before the order is placed an effort will be made to adjust the matter of price and the question of deliveries, thereby showing that no final agreement had been reached, and that the clearance order was dependent on such an agreement being reached. Thereupon Mr. White placed an order by wire for tires with the Firestone Co., thereby taking up his option for both 56-inch and 60-inch wheel tires. That part of this order which covered 56-inch tires was later cancelled without loss to claimant, and is, therefore, not involved in this case. He also wired the St. Marys Co. to "begin buying shorts for woodstock."

7. On November 4 Mr. White returned to Washington and found Capt. Day, of the Procurement Division, was away. He then called on Lieut. Abbott L. Norris, of the Production Division, who had no authority to contract, as Mr. White well knew. Mr. White testified that Lieut. Norris told him that necessary information from the Engineering Division had not arrived, and that the order could not be written that day, and it would take a few days to straighten the matter out, but for Mr. White to go home and when an order could be written it would be mailed to him. Evidently Lieut. Norris made this statement to Mr. White on account of his misunderstanding what Capt. Day had previously told him, and on account of his not knowing that Capt. Day had definitely determined not to award the claim-

ant any part of the 56-inch wheel award. Capt. Day testified that he never informed the Production Division or Lieut. Norris that the St. Marys Co. would be given an order for 56-inch wheels. (Record, p. 95.)

8. When Mr. White returned to St. Marys, Ohio, on November 5, he found the following letter at his office:

[“ Ordnance Department. Office of Ordnance District Chief, Walsh Building, S. E. Cor. Third and Vine Streets, Cincinnati, Ohio.]

“ PRODUCTION DIVISION,

“ October 30, 1918.

“ ST. MARYS WHEEL & SPOKE CO.,

“ St. Marys, Ohio.

“ Attention: Mr. Tom White.

“ DEAR SIR: We have advice from Lieut. Col. J. G. Scrugham, of Washington, Artillery Section, that the Procurement Division are about to place orders with you for 1,000 60-inch wheels and 5,000 56-inch wheels.

“ They request that you immediately survey the wood-stock situation, advising through this office at once your total quantity of rims and spokes on hand which will apply on this new order, and how long it will take to procure this stock providing it is not already on hand.

“ Evidently, Washington has been given the impression that all wood-stock can be procured and delivered to your plant to cover this order by January 1st.

“ An immediate reply to this letter is requested.

“ G. S. HAYDOCK,

“ Manager Cincinnati Dist., Production Div., Ordnance Dept.

“ By C. A. FRICK,

“ Manager Sub-Dist. Office, Muncie, Indiana.”

The letter therein referred to from Lieut. Col. Scrugham, who was the chief of the office which Lieut. Norris was in, is dated October 26, five days prior to the time Mr. White was positively told by Capt. Day, of the Procurement Division, that he would not be awarded a contract for any part of the 56-inch wheels required.

9. On November 15 claimant received the following telegram from Mr. C. A. Frick, who was in charge of production in the subdistrict where claimant's factory was located:

“ 11B BR 61 GOVT

“ MUNCIE IND 1.20 P. Nov 15

“ ST. MARYS WHEEL & SPOKE CO.,

“ St. Marys, Ohio.

“ Cincinnati office has wire from Washington advising hold up on operations covering your new contract for three thousand sixty-inch wheels and five thousand fifty-six inch wheels stop Advise you to hold up procurement of all materials for above order and not to place additional stock in dry kilns stop

“ C. A. FRICK,

“ 1.38P.”

Claimant did not receive a formal award of a contract for 5,000 56-inch wheels, but did receive a letter dated October 31, 1918 ("Attention of Capt. Day") from the Artillery Section notifying the St. Marys Co. that by direction of the Chief of Ordnance its contract, No. CF-371, was being amended so as to provide for an additional quantity of three thousand 60-inch artillery wheels.

10. The record further discloses certain pertinent facts as to the material alleged to have been acquired in preparation to perform the prospective contract for five thousand 56-inch wheels. In submitting its bid to the Procurement Division on September 30, 1918, the St. Marys Co. represented that it then had on hand the following woodstock for 56-inch wheels:

64,400 pieces for 2½-inch spokes sufficient for 4,025 wheels.

9,000 pieces rim strips sufficient for 4,500 wheels.

In his affidavit of November 17, 1919, Mr. White explains that the material listed in his bid of September 30 was material which was then on hand to fulfill his subcontract with Prudden Wheel Co. for 100,000 spokes and 10,000 rims for 56-inch wheels, which was part of a contract No. CF-505 which the Prudden Co. had with the Government. This subcontract was completed and the last shipment made March 18, 1919. Mr. White stated that he listed this material as being on hand when making his bid on September 30 because he hoped to be allowed to divert it from a subcontract which he had and use it on the direct contract with the Government which he hoped to obtain. Evidently this material was later used on the claimant's subcontract, which was fully completed March 18, 1919. (See affidavit of Mr. White, Nov. 17, 1919.)

The St. Marys Co. had maintained since December, 1917, a traveling agent in the Mississippi River hardwood belt, who had instructions to buy woodstock wherever he could obtain it. There accompanies this claim three copies of orders of the claimant confirming orders placed by the traveling buyer, Mr. Falk, with Arkansas concerns, viz, (1) confirmatory order dated August 22, 1918, requiring shipments to be made prior to October 1, 1918; (2) order of November 6 confirming Mr. Falk's order of November 2, which required shipments to be made prior to January 1; and (3) order dated November 8, 1918, confirming Mr. Falk's order of November 4, providing "shipment to be made prior to December 15, 1918, if possible, and not later than January 1, 1919. Do not start cutting on the first item of this order until advised further."

It does not appear whether the claimant made any effort to cancel these orders after the signing of the armistice, nor how much of this woodstock was necessary to complete 5,000 wheels over and above the woodstock which claimant stated in its bid it had on hand on September 30.

DECISION.

1. The claimant herein seeks reimbursement for purchases alleged to have been made in preparation to perform a prospective order for five thousand 56-inch artillery wheels. It is not alleged in claimant's petition with whom the agreement was made, but claimant contends that it made commitments for which reimbursement is now sought on account of: (a) A statement made to Mr. White by Maj. Guthrie, of the Engineering Division, on August 22, 1918; (b) a statement made to Mr. White by Capt. Day, of the Procurement Division, Ordnance Department, on October 31, 1918; (c) statements made to Mr. White the night of October 31 by Maj. Guthrie, Mr. Parsonage, and Mr. Bannister at the Raleigh Hotel; (d) a statement made to Mr. White by Lieut. Norris, of the Production Division, Ordnance Department, on November 4, 1918; (e) a letter dated October 30 from the subdistrict production officer which stated that Procurement Division had advised that it was about to place an order with the claimant for 56-inch artillery wheels.

2. As there is a conflict in the testimony of the various witnesses, it becomes necessary for the Board, in deciding this case, to weigh the evidence and to gather from the record the situation which surrounded the various persons so that the facts may be seen in their true light. One fact stands out preeminently, and that fact is that Mr. White, the sole owner of St. Marys and president of the claimant company, was thoroughly familiar with the functions of the various War Department branches and agencies. He knew who had the power to contract and who had not. Mr. White was also chairman of the wheel manufacturers' war-service committee, and as such did not hesitate to recommend his own company to the Procurement Division for further contracts with the Government. His complete knowledge of the departmental procedure followed in awarding contracts can not be questioned.

3. With these facts in mind we will consider seriatim the various grounds upon which the claimant relies in support of its claim.

(a) Even though Maj. Guthrie may have told Mr. White on August 22, 1918, that the Government would soon be placing additional orders for wheels and the St. Marys Co. was sure to get its proportion of the orders, such a statement by an officer who had no power to contract, as Mr. White well knew, must be treated as merely an expression of opinion. No implied contract or obligation on the part of the Government to place future orders with the claimant can be spelled out of Maj. Guthrie's words. The further words attributed to Maj. Guthrie by Mr. White, that it would be wise to continue to procure woodstock, are nothing more than friendly

advice given by one who was generally familiar with the wheel situation, but who had no power to bind the Government. Mr. White assumed the ordinary business risk of acting on Maj. Guthrie's statements and advice, as he knew Maj. Guthrie could not make a contract or do anything further than to recommend.

It is interesting to note that although claimant alleges it placed an order for woodstock on August 22, after talking to Maj. Guthrie, which order required the woodstock to be shipped prior to October 1, no mention is made by Mr. White of this woodstock the day previous to October 1, when he prepared and submitted claimant's bid to the Procurement Division. The woodstock referred to in the bid was for a contract claimant had with the Prudden Wheel Co. and was not purchased for a prospective contract directly with the Government.

We therefore conclude that no agreement, express or implied, within the meaning of the act of March 2, 1919, was made on August 22, 1918, between Maj. Guthrie and the claimant.

(b) The testimony of Mr. White that Capt. Day, of the Procurement Division, told him on October 31 that he would get an order for 56-inch artillery wheels is positively and directly contradicted by Capt. Day. Capt. Day, at the hearing, produced copies of the production sheets of wheel contractors in explanation of his testimony, which corroborated his version of what he told Mr. White on October 31, viz, that the St. Marys Co. would not receive any part of the contemplated 56-inch wheel order, because it had been behindhand on its present contract for 56-inch wheels while other concerns had made good on their existing contracts, and so should be rewarded by additional orders. Capt. Day testified he talked the matter over with his superior officer, Maj. Nichols, and they both agreed that the St. Marys Co. should have no part of the order for 56-inch wheels, and he so informed Mr. White on October 31.

Where an alleged oral agreement is relied upon as a basis of liability under the act of March 2, 1919, the evidence, taken as a whole, must establish the fact that an agreement, as contemplated by the act, was in fact entered into. The evidence adduced in this case is not sufficient to establish such an agreement. We must, therefore, find that no agreement, within the meaning of the act of March 2, 1919, has been proven by the evidence in this case, because the claimant has failed to prove that Capt. Day gave or agreed to give it an order for five thousand 56-inch wheels on October 31, or at any other time.

(c) The remarks made at informal conference held at the Raleigh Hotel on the evening of October 31 are also made the basis of contention that the Government is obligated to the claimant for

woodstock purchased after that conference. It is clear that Mr. White knew that none of the gentlemen at this conference had the power to contract. Their remarks were based on Mr. White's statement to them that Capt. Day had promised him an order that morning for 56-inch artillery wheels. In this Mr. White was mistaken, and hence any remarks which the gentlemen may have made to Mr. White were based upon false or erroneous premises which Mr. White had given them. Mr. White knew full well that Capt. Day, of the Procurement Division, was the officer responsible for wheel contracts. He had talked to Capt. Day that morning and, according to Capt. Day, was told he would not receive any part of the 56-inch wheel award. If Mr. White preferred to seek the advice of civilians and an Engineer officer, who had no power to contract, and accept their statements as to what they thought would happen rather than the statements of the officer in the Procurement Division who was responsible for making wheel contracts, it is his loss. What others, not responsible for making contracts, may have thought or told the claimant is perfectly immaterial, because the claimant had been informed within a few hours, by the officer responsible for making the award, that he would not be given a contract.

(d) When the statement alleged to have been made on November 4 to Mr. White by Lieut. Norris, of the Production Division, is scrutinized, it is clear that it does not amount to a promise of a contract which can be made the basis of liability for the materials subsequently purchased. In effect, Lieut. Norris told Mr. White it would take several days to straighten out the matter and an order would be mailed to Mr. White when it could be written. Lieut. Norris's statement carries with it the conclusion that there was some hitch in the matter which had to be straightened out. That hitch was the prior and continuous refusal of Capt. Day, of the Procurement Division, to give Mr. White any part of the new order for 56-inch wheels. Of this fact Mr. White had been informed by Capt. Day. Mr. White also knew that it was Capt. Day, and not Lieut. Norris, who had final decision. We must, therefore, reach the conclusion that the statement made by Lieut. Norris to Mr. White did not justify the latter in purchasing material in preparation to perform a contract which he knew, or ought to have known, from the statements made to him by the officer who awarded contracts, would never be given him.

(e) The final point which claimant relies on is the letter which he found waiting for him at St. Marys, Ohio, on November 5, from the subdistrict production officer, dated October 30, stating that the Procurement Division had advised that it was "about to place an

order" with claimant for 56-inch artillery wheels. The date of letter referred to is most material. It was written October 30, the day before Mr. White had an interview with Capt. Day of the Procurement Division, when he was told that no order for 56-inch wheels would be placed with the St. Marys Co. Having received personally authoritative information from the Procurement Division the day after the letter from the subdistrict production officer was written, the claimant knew, or should have known, that an order was not to be placed with it. If claimant preferred to disregard the positive and final information he received from the Procurement Division subsequent to the date of the subdistrict production officer's letter, the claimant did so at his peril.

4. A full hearing was had on this case on December 20, 1919. On December 24 claimant wrote this Board asking for a continuance of a hearing, as claimant deemed it important to secure additional testimony, either by affidavit or personal appearance. On January 5 the Board notified claimant as follows:

"In reply to your letter of December 24, 1919, this Board wishes to advise that in order that you may feel that you have had full opportunity to present your case, the decision in the case will be held up until January 10 to permit you to furnish the Board with separate affidavits of each of the witnesses whose testimony you wish to consider, containing the substance of the testimony that each witness would give if they were summoned to attend and testify at a postponed hearing.

"The Board will then decide whether it will consider these affidavits as evidence or will further continue the case and summon the various witnesses to give their testimony orally before the Board on or before January 10, 1920."

In response to this letter the claimant submitted three affidavits relative to the character, integrity, and veracity of Mr. White and an affidavit of Paul W. MacMahon. On consideration of these affidavits the Board notified the claimant on January 10 that a continued hearing would be held on January 19. On January 13 the claimant, through its attorneys, telegraphed the Board waiving continued hearing on Monday, January 19, stating that it would not have any witnesses present on that date. The telegram referred to a letter which was to follow. The letter of January 13 from the claimant's attorneys states:

"We are now advised by our clients that they do not desire to appear further in person, and will waive the privilege granted them to be held on Monday, January 19, or at a later date."

This letter of January 13 is in the nature of a brief on behalf of the claimant and refers to affidavits submitted for the express purpose of the Board's considering whether it would grant a con-

tinuance, and for that purpose only, and to another affidavit submitted after claimant's attorneys had notified the Board that it did not desire to have a further hearing.

In view of that fact that the Board notified the claimant on January 5 that it might submit separate affidavits of each of the witnesses so that the Board could determine whether it would consider these affidavits as evidence or would further continue the case so that the witnesses could give their testimony orally before the Board, and in view of the fact that the Board determined on these affidavits that it would grant a continuance and allow the witnesses orally to testify, it is apparent that the affidavits in question are not part of the record on the merits of the case. Furthermore, the claimant has waived the opportunity accorded it to have an adjourned hearing and to submit the testimony of other witnesses at such hearing so as to afford the Government attorney an opportunity of cross-examination. For these reasons, no reference is made to the contents of the affidavits in the body of this opinion. We have, however, examined these affidavits as though properly before us on the merits of the case, and they do not alter the conclusions which we have reached.

5. The Board is of the opinion that the claimant has failed to show the grounds entitling it to relief under the act of March 2, 1919, and hence the relief sought is denied.

Col. Delafield, Mr. Patterson, and Mr. Bryant concurring.

Case No. 1828.

In re CLAIM OF WALLACE & TIERNAN CO.

- 1 **DISPUTE UNDER CONTRACT EXECUTED IN MANNER PRESCRIBED BY LAW.**—Where a purchase order is executed according to law and goods are delivered under it to the Government, but are thereafter returned, and a dispute arises as to the terms of settlement, there is a controversy for the Board to determine under G. O. 103.
2. **CLAIM AND DECISION.**—Claim under G. O. 103, based upon a purchase order. Claimant seeks to recover for depreciation of equipment and for the failure to return certain parts of the same. Held, claim should be allowed in the amount of \$130.92.

Lieut. Col. Junkin writing the opinion of the Board.

This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$420, under the following circumstances:

FINDINGS OF FACT.

1. On September 4, 1918, First Lieut. Mott B. Schmidt, Chemical Warfare Service, U. S. Army, at that time assigned to duty at Edgewood Arsenal, Hastings-on-Hudson, as purchasing officer, under Maj. U. S. Arnold, Q. M. C., gave the claimant a written order for one Manual Control Chlorinator Solution Feed, Type A, f. o. b. New York City, at a price of \$420.

2. This equipment was sent to the arsenal and received and held by it until after the armistice, but was never installed or used; and after the armistice was returned to the claimant by the Government; but in returning the equipment, the arsenal authorities failed to return certain articles set up in the petition of the claimant at a value of \$58.65.

3. In a letter of November 15, 1919, to this Board, sworn to before a notary, Lieut. Schmidt makes the following statement:

“The circumstances in connection with this matter are, to the best of my recollection, as follows: The apparatus in question was ordered from the Wallace and Tiernan Company at about the time stated in your letter, and was to be used for chlorinating the water supplied to the troops at the barracks, in connection with the Hastings Plant of the Edgewood Arsenal, Hastings-on-Hudson, New York. The source of the supply of the water was from an aqueduct belonging to the City of New York, and we received special permission for tapping into same. The Water department engineers, however, informed us that the water was not safe for drinking purposes without chlorine treatment, and on the recommendation of the various engineers the chlorinator mentioned above, which was the simplest and most inexpensive type available, was ordered from Wallace & Tiernan Company.

I am distinctly under the impression, although I have no access to the records, that they received a regular purchase order, under the authority of the constructing quartermaster, in addition to the verbal order which they mention. The chlorinator was delivered to the Government in the manner claimed, but I do not think it was ever used, as all work was stopped before the construction reached a point necessary to the installation of the equipment. I believe that the material was then returned to the manufacturer, probably without it having ever been unpacked.

"Briefly, then, I can certify that the material was properly ordered and delivered, but have no knowledge as to what damage the return of same might cause the claimant."

4. The Board of Contract Adjustment, Edgewood Arsenal, regarding this as a class B claim, arising under the act of March 2, 1919, known as the Dent Act, took up with the claimant the matter of its settlement, but being unable to reach a settlement with the claimant, passed it on to this Board, where it was discovered to be not a class B claim but a claim arising under General Order No. 103. The claimant has stated to this Board its willingness to accept settlement originally proposed by the Edgewood Arsenal to claimant in a letter of May 27, 1919, which reads in part as follows:

"Under these circumstances the board suggests the following principle of settlement: Edgewood Arsenal will pay for the materials shipped and not returned as itemized in the contractor's letter above referred to and amounting to \$58.65. Since the original contract price was \$420.00, the deduction of the \$58.65, which represents materials paid for, leaves a balance of \$361.35, which represents the contract price of the materials returned to the contractor. It is the opinion of the board that a charge for carrying and depreciation on these items returned may be set fairly at 20 per cent of their contract price. Accordingly, the board proposes to pay to the contractor on account of the depreciation of these returned materials 20 per cent of \$361.35, or \$72.27. With the \$58.65 above referred to, which is unpaid on account of materials delivered, this makes a total of \$132.92."

DECISION.

1. It is the judgment of this Board, from the foregoing facts, that an agreement, executed in the manner prescribed by law, exists between the claimant and the United States under which a dispute has arisen which it is the duty of this Board to determine.

2. It is adjudged that the settlement proposed by the Edgewood Arsenal board as set forth in paragraph 4 of the findings of fact is a fair and just settlement of this contract, and the claimant is entitled to recover thereunder the sum of \$130.92.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Chemical Warfare Service, for proper action. Col. Delafield and Mr. Harding concurring.

Case No. 2278.

In re CLAIM OF ARMOUR & CO.

1. **CANCELLATION ORDER.**—Where claimant received an order cancelling a previous order for South American corned beef, which cancellation order excluded goods which were afloat, the Government is bound to accept and pay the contract price for a cargo which was loaded prior to, but sailed one day after, the cancellation.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an express oral contract for canned South American corned beef. Held, claimant is entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, but treated herein as though properly made on Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$71,402.40 (and subsequently amended to total \$101,701.22) by reason of an agreement alleged to have been entered into between claimant and the United States.

2. On or about April 18, 1918, a conference was held in Chicago between representatives of packing industries which had plants in South America and Maj. O. F. Skiles, Q. M. C., assistant depot quartermaster, Chicago, whose duty it was to negotiate all contracts for packing-house products. This conference was called owing to the necessity of the Government to obtain South American beef products in large amounts, and the various packers were requested to make offers of the quantities of South American canned meats they could deliver, and it was agreed that the same price should be given to all concerns for the same commodities. The packers agreed with Maj. Skiles that the price of No. 2 cans of corned beef, weighing 24 ounces, should be 60 cents per can, f. o. b. New York, based upon a freight rate of \$35 per ton from South America, with the further agreement that if the freight rate was greater or less than \$35 a ton, a corresponding increase or decrease in price would be made on satisfactory proof that a different freight rate had been paid. It was then supposed that shipping space of approximately 60,000 tons would probably be available to carry such supplies from South American ports to New York, but it later developed that only 30,000

tons of shipping space would be available, and that, owing to the conditions of war, no reliability could be placed on dates of sailing and arrival, particularly as sailing ships principally were used. The various packers represented at this conference subsequently made their proposals which exceeded in total 30,000 tons, and, accordingly, in making the allotments, the amount allotted to each packer was reduced so that the total of all allotments would be 30,000 tons, which was all available shipping space that was expected to be provided. The claimant company was allotted 5,000 tons, of which 1,000,000 pounds was for corned beef in No. 2 cans of 24 ounces for May delivery and 1,000,000 for June delivery, and the claimant was so notified by the depot quartermaster by letter of May 7, 1918. In this allotment order specific reference is made to the conference of April 18, where the price was agreed upon. (Claimant's Exhibit No. 1.)

3. The method adopted by the Quartermaster's Department in respect to these orders was informal but justified on account of the peculiar circumstances surrounding the transaction. Maj. Skiles explained that the allotment order of May 7, 1918 (Exhibit No. 1), called for 1,000,000 pounds of corned beef to be delivered in May and 1,000,000 more in June, but he knew at the time that it was physically impossible for the contractors to do so, in that they could not obtain shipping space from South America in the time specified in the allotment order, and there was no intention to hold the contractors to the dates specified. The packers were notified by Maj. Skiles that deliveries would be acceptable to the Government under the order of May 7 if forthcoming at the earliest practicable date. He also testified that it was impossible for the packers to determine in advance the exact number of cans that would pass inspection in New York, and hence an overdelivery of 5 per cent in excess of amount called for was always allowed. Maj. Skiles considered his letter of May 7 as the tentative agreement of the Government to accept such quantities of South American corned beef from Armour & Co. as they delivered approximately 2,000,000 pounds, at the prices agreed upon. As to the method of payment Maj. Skiles testified that the meat was inspected at New York on arrival and purchase orders were made out for the quantities accepted, upon which orders payments were made.

4. In pursuance to the agreement of May 7, 1918, Armour & Co. shipped from South America nine shiploads of meat products, which arrived in New York on various dates between August 27, 1918, and November 10, 1918. All of these products which passed inspection were accepted by the Government and paid for. The claim now presented concerns the cargo of corned beef which arrived in New York on December 23, 1918, on the ship *Sterna*, and the cargo which ar-

rived on January 22, 1919, on the ship *Bjorneffjord*, and expenses incident thereto.

5. On November 25, 1918, Maj. Skiles, "by authority of the Director of Purchase and Storage," wrote the claimant as follows:

"1. In view of the changed conditions abroad, you are informed that all allotments for South American corned beef that have been made your firm, and that remain undelivered, excluding any quantities that may now be floated, are hereby cancelled.

"2. It is desired that no more shipments be made, and that you instruct your South American representatives to load no more ships with South American products for this office.

"3. Please inform this office immediately as to the quantity of such products as are now en route to the United States destined for this office, and the name of the ship on which such products are loaded."

On the following day claimant acknowledged receipt of the letter and stated:

"We note therein that all shipments will be canceled except those that are afloat and undelivered. We presume this also includes any corned beef we may have on wharf in South America ready for loading, and we are acting accordingly."

Not receiving any reply to the last-mentioned letter of November 26, claimant's representative called on Maj. Skiles on November 28 and was told that corned beef on the wharves in South America, though not actually afloat on November 25, would be accepted by the Government as not within the purview of the cancellation order of that date.

6. We have previously stated that prior to the cancellation notice of November nine shiploads of claimant's South American meats had arrived in New York and have now been accepted by the Government and paid for under authority of the allotment order of May 7. The claim now under consideration relates to the cargoes of corned beef of two other ships, the *Sterna* and *Bjorneffjord*, which arrived later.

The ship *Sterna*, with a cargo of 5,842 cases of corned beef (48 cans in a case), arrived in New York December 23, 1918. These cases of corned beef are protected by fire insurance and are now stored in Brooklyn, N. Y., in the name of the claimant. This shipment, aggregating 280,416 cans, has not been accepted by the Government, because it has been claimed that the cancellation order of November 25 applied to them, as they were supposed not to be afloat on that date. A copy of the bill of lading signed by the master of the sailing ship *Sterna*, dated Buenos Aires, November 13, 1918, is in evidence. By it the master of the ship acknowledges receipt of 5,935 cases of No. 2 corned beef as of November 13, 1918. The ship actually sailed November 26. Its cargo was clearly "afloat" at the time of the cancellation order issued on November 25. Efforts have been made by

claimant to sell the 5,842 cases of corned beef, which are in controversy, but they have not been sold, as they will not bring more than 39 cents a can.

The other ship, the *Bjorneffjord*, arrived in New York on January 22, 1919, with a cargo of 3,558 cases, or 170,475 cans of corned beef which was stored at the Army piers and no fire insurance has been carried thereon. On November 4, 1919, the zone supply officer, New York, wrote claimant: "This corned beef is now being disposed of by this office." (Claimant's Exhibit No. 5.) The Government has not yet made payment for these 170,475 cans of corned beef which it has accepted.

DECISION.

1. On May 7, 1918, the Government gave to the claimant an order for 2,000,000 cans of South American corned beef, at a previously agreed price of 60 cents a can f. o. b., New York, based on freight rates of \$35 a ton from South America, the price to be adjusted, up or down, on the freight rate actually paid by the claimant. The order called for May and June deliveries, but the claimant was informed by the Government contracting officer that he knew deliveries on such dates were impossible, and that deliveries would be accepted if forthcoming at the earliest practicable date, as it was most difficult to obtain shipping facilities.

Claimant was also advised that reasonable overdeliveries would be accepted, and that all payments would be made on purchase orders issued in New York for the corned beef that passed inspection there.

2. In pursuance to said agreement the claimant made large expenditures prior to November 12, 1918, and actually delivered in New York, prior to said date, nine shiploads of corned beef which have been accepted and paid for.

3. On November 25 claimant received an order cancelling the order of May 7, which, by its terms excluded corned beef which was afloat, and, by instructions from the contracting officer, excluded corned beef on the wharves in South America ready to load. The master of the sailing ship *Sterna* acknowledged receipt of the cargo of corned beef invoiced to the claimant by bill of lading, dated Buenos Aires November 13, 1918. This cargo included the 280,416 cans of corned beef, for which claim is now made. The ship actually sailed on November 26 and arrived in New York December 23, 1918. It was therefore, clearly established that the cargo of corned beef in controversy was afloat on November 13, 12 days prior to the cancellation order of November 25, which cancellation order was effective only as to corned beef not then afloat. It follows that the cancellation order does not apply to the cargo of the *Sterna*. This corned beef

is now stored in Brooklyn, protected by fire insurance, and has not been accepted by the Government.

4. The steamer *Bjorneffjord* arrived in New York, January 22, 1919, with a cargo of 170,475 cans of corned beef which have been accepted by the Government, but not paid for.

5. The Board finds that an agreement was entered into between claimant and the Government by which the Government agreed to accept f. o. b. New York and pay for No. 2 canned South American corned beef up to approximately 2,000,000 cans. which should pass inspection.

The cancellation order of November 25, 1918 was not operative against the cargo of the ship *Sterna* consisting of 280,416 No. 2 cans of corned beef which was loaded on November 13, shipped from South America, and has arrived in New York, but has not been paid for by the Government.

The Government has accepted the cargo of the *Bjorneffjord*, amounting to 170,475 cans of corned beef, but has not paid for the same.

6. The Board is of the opinion that an obligation has arisen under the act of March 2, 1919, to pay to the claimant the fair and reasonable value of the 170,475 cans of corned beef, which arrived in New York on the ship *Bjorneffjord*, and which has been accepted by the Government; and to pay the reasonable value of 280,416 cans of corned beef which arrived in New York on the ship *Sterna*, and that the price agreed upon between the claimant and the Government shall be considered as prima facie evidence of the value of said corned beef, proper deductions being made for salvage.

7. The Board is also of the opinion that the storage and insurance charges are proper charges against the Government, but that the claim for interest should not be allowed, as there was no special agreement shown to have existed in this case by which the Government obligated itself to pay interest.

DISPOSITION.

1. The Board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield, Col. Boggs, Mr. Harding, and Mr. Eaton concurring.

Case No. 1526.

In re **CLAIM OF SPANG & CO.**

- 1. FACILITIES—JOINT NEGOTIATIONS BY PROCUREMENT AND PRODUCTION DIVISIONS.**—Where authorized representatives of the Procurement and Production Divisions jointly consider and decide that a manufacturer shall forthwith increase its facilities for machining shells, and it is instructed so to do by an authorized agent of the Production Division and assured that it will receive large contracts, and it does so increase its facilities, and does not receive the contracts owing to the termination of the war, there is an agreement within the purview of the act of March 2, 1919, between claimant and an authorized agent of the Government whereby claimant is entitled to be reimbursed expenditures so made.
- 2. CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$107,823.18, for increased facilities for making shells at the request of an authorized agent of the Government. Held, claimant is entitled to recover.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage & Traffic Division Supply Circular No. 17, revised, of 1919, for \$107,823.18, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. A formal agreement, dated January 1, 1918, was entered into between the Standard Steel Car Co., of Butler, Pa., and the United States, covering the machining and banding of one million 155-millimeter common steel shells. In this agreement it was provided that the Standard Steel Car Co. might associate itself with Spang & Co., the claimant herein, in the performance thereof. Accordingly, by a subcontract between the Standard Steel Car Co. and the claimant, the claimant agreed to machine 300,000 of said 1,000,000 shells for the Standard Steel Car Co.

3. Under these contracts the daily production was to be 5,000 shells, of which the Standard Steel Car Co. was to machine 3,500 and the claimant 1,500. In the course of performance, it soon became evident that deliveries were not being made efficiently under the existing arrangement, and officers and agents of the Govern-

ment, acting in accordance with the general custom and practice obtaining at the time in their respective departments, and within the scope of their usual duties, entered into negotiations with the claimant with a view to having the subcontract cancelled and a prime contract issued to the claimant for the machining of 500,000 of such shells. The claimant's plant was not of sufficient capacity to produce more than 1,500 shells per day, and it was the desire of the Ordnance Department that its plant should be increased to a capacity to machine 2,200 to 2,500 shells per day at the earliest practicable moment, so that a prime contract for the machining of 500,000 shells could be issued to claimant.

4. On or about April 19, 1918, Lieut. Col. H. H. Scovil, who was then Maj. Scovil, assigned as production manager, Pittsburgh District Ordnance Office, in company with Lieut. Chas. A. Carpenter and Second Lieut. W. W. Corkran, a production officer, Pittsburgh District Ordnance Office, visited the plant of Spang & Co., Butler, Pa., and under instructions and with the approval of their respective superior officers in the Production Division in Washington, namely, Col. H. B. Hunt and Lieut. Col. Robert A. Bruce, told claimant that if it would extend its plant to a capacity of 2,200 shells per day, or thereabouts, or more if possible, Maj. Scovil would see personally that they were given a prime contract from the Ordnance Department in Washington. Lieut. Carpenter had charge of direct investigation in what was known as the Field Squad. The testimony of Lieut. Carpenter confirms that of Maj. Scovil as to such instructions and promise given on this occasion.

5. On May 18, 1918, the Pittsburgh District Ordnance Office wrote a letter, signed by Lieut. W. W. Corkran, to the gun section of the Ordnance Department Production Division at Washington, as follows:

"1. The above company are manufacturing, at Butler, Pa., 155 m/m machined shells on subcontract from the Standard Steel Car Co., whose order is G-642-383-A, for 1,000,000 155 m/m shells.

"2. Spang & Company's contract is for 300,000 shells. Their shop is laid out for a production of 1,500 shells per day, from which shop at the present time they are producing 1,000 shells daily, which will probably be increased to 1,500 per day by the first of June.

"3. Spang & Company, with the installation of new additional machine tools, which their shop is in position to accommodate, could increase their production to 2,200 shells per day. They are willing to purchase these machines in order to increase their production, provided the Ordnance Department will place contract with them direct for the machining of 155 m/m shells, as the transactions in connection with this subcontract have not been entirely satisfactory to this company.

"4. Spang & Company have developed a competent organization, and it is believed could complete such contract satisfactorily."

6. On June 6, 1918, Maj. (later Col.) Robert A Bruce, second in command of the Artillery Munitions Section, Production Division, Ordnance Department, stationed at Washington, wrote the Pittsburgh Ordnance Office, as follows:

"1. After going into the details of the situation—subcontract with Spang & Co.—for 300,000 155 m/m shell machining from Standard Steel Car Co., it is the writer's opinion that the contract for machining 1,000,000 155 m/m shell forgings which is held by the Standard Steel Car Co., i. e., contract No. G-642-383-A, should be reduced to 500,000 machining, and that Spang & Co. should be given a Government contract for machining 500,000, minus the number of forgings which the Standard Steel Car Co. has had already delivered to them for machining on their subcontract.

"2. There are plenty of forgings available, so that Spang & Co. could go right ahead on the Government contract after finishing up forgings supplied to them to date on subcontract with Standard Steel Car Co.

"3. It is respectfully requested that you advise this office if you concur with us in this opinion, so that proper recommendations may be made to the Procurement Division with respect to the above."

Maj. Bruce's superior officer at that time was Lieut. Col. Hunt, and the chief of his division was Gen. C. C. Jamison. Bruce testifies (Tr. p. 82) that the last quoted letter was seen and approved and sent out by Col. Hunt himself and that the action proposed to be taken in that letter had been taken up orally by Maj. Bruce with Gen. Jamison, who instructed him to "go ahead" (Tr. p. 85).

7. Maj. Bruce also discussed on a number of occasions the matter of increased facilities being made by Spang & Co. and a prime contract given them with Maj. Rodney D. Day, who was at that time assigned to the Procurement Division of the Ordnance Department, and was the ranking officer next to the head of the Procurement Section. Maj. Bruce and Maj. Day had daily conferences (Tr. p. 86) on the matter of increasing facilities for the production of shells and cooperated in every way. When they reached a conclusion they would put it on paper, and Maj. Day would submit it to his chief, Col. Lamont, in the Procurement Division, and Maj. Bruce would submit it to Gen. Jamison, Chief of the Production Division. Maj. Bruce in his discussion of this matter with Maj. Day and Gen. Jamison (Tr. p. 85) informed them of the fact that the giving of a prime contract to the claimant involved an expensive addition to claimant's plant.

On June 14, 1918, the Pittsburgh District Ordnance Office, Production Division, wrote the Munitions Section, Production Division, Washington, D. C., attention of Maj. Bruce, a letter signed by W. F. Sampson, production engineer of the Pittsburgh District Ordnance Office, as follows:

"1. In reply to your communication of June 6th, concerning the subcontract with Spang & Company for 300,000 155 m/m shells from the Standard Steel Car Company, Butler, Pa., contract G-642-383-A, we find that Spang & Company's production, both as regards quality and quantity, is equal to that of the Standard Steel Car Company at the present time.

"2. In view of this fact, we see no objection to Spang & Company receiving a direct Government contract for machining 500,000 shells, provided they can be given some reasonable assurance that they will receive future orders which will justify them in the outlay for plant and equipment necessary to produce this material.

"3. It is our opinion also that the Standard Steel Car Company should be given equal assurance that they will receive future Government orders to offset the reduction in output which the new allotment to Spang & Company will entail upon them."

8. Sometime early in June, 1918, the claimant was orally informed (Tr. p. 28) by Engineer W. F. Sampson and Lieut. Carpenter at claimant's plant at Butler, that the matter of an extension to its plant had been taken up with the Washington officials, and that such officials said the contract would be granted; that it was agreeable at Washington for the claimant "to go ahead and get the stuff and material such as machinery and facilities and increase our building." (Tr. p. 28.) On this occasion both Lieut. Carpenter and Engineer Sampson (Tr. pp. 30-31) definitely instructed the claimant to go ahead; that the matter had been taken up at Washington in the Procurement Division, and it had agreed that a contract would be sent to claimant. They instructed the claimant "to go ahead and get this machine and increase the floor space and the other details that had been talked over with Col. Scovil" when he and Lieut. Carpenter and Lieut. Corkran were there on April 19, and promised that "they would arrange to get a formally executed contract" for the claimant. The increased facilities which would be required were stated by Sampson and Carpenter to be facilities sufficient "to bring production up to 2,200 shells per day." (Tr. p. 32.) Engineer Sampson and Lieut. Carpenter then conferred with Col. Scovil, and as a result the Pittsburgh Ordnance office sent the letter of June 14 last above quoted. Thereupon the claimant proceeded with the extension (Tr. pp. 91, 92) of its facilities in pursuance of the instructions theretofore received from Col. Scovil, Lieut. Carpenter, Lieut. Corkran, and Engineer Sampson.

9. On June 22, 1918, Lieut. Carpenter and Lieut. Corkran, Col. Bruce and Maj. Day discussed the situation with respect to giving the claimant a prime contract, and the conclusion is unavoidable that these higher officials of the Production and Procurement Department were fully informed as to the instructions that had been given

to the claimant to increase his facilities and approved the proceeding. Maj. Scovil testifies (Tr. p. 57):

"Q. Did you know at that time (June 22, 1918) that Spang & Co. were increasing their facilities?—A. Yes; it was a tacit agreement that Spang & Co. were to go on increasing their facilities * * * Col. Bruce was the head of the shell machining section of the ammunition section of the Production Division, reporting direct to Col. H. B. Hunt, who reported direct to Gen. C. C. Jamison. Maj. Rodney Day was in the Procurement Division and had charge of placing all contracts for shell machining and he reported to Lieut. Col. Merrill G. Baker, who reported to Col. Lamont."

Maj. Scovil further testifies (Tr. p. 58 et seq.):

"And every time I visited Butler I went to Spang's plant * * *. All the conversations I had with the Spangs was along the lines of how they were proceeding with their construction. I recall being there when they were excavating their building. I recall talking to them at various times concerning this work of increasing their output from 1,200 to 2,200 shells.

"I also recall that they placed an order for a lathe through our office, or some one in the Production Division necessarily got them the priority or they could not have the lathe. They were kept in touch with all the time. On July 12th (1918) I have a note in my diary General C. C. Jamison was in Pittsburgh and I told him of the situation. He was in accord with what we had done and knew about it.

"He was chief of the Production Division at that time. I took up with him in detail the work that was being done by Sprang & Company's increasing their facilities."

Being questioned as to what led this claimant to extend its plant and make the expenditures which are the basis of the claim, Maj. Scovil testified (Tr. p. 61):

"He (the claimant, Mr. Spang) was told by me and Lt. Carpenter under my instructions and Lt. Corkran and Mr. W. F. Sampson and Captain Conklin, to go ahead and increase his facilities, to take care of 2,200 shells per day, and that when the time came I would see that he secured a prime contract for machining 155 m/m shells, and that further so far as the war lasted, he would have contracts just as fast as he could complete them, and that I had discussed the matter with Col. Robert A. Bruce, who in turn had discussed the matter with Major Rodney Day, of the Procurement Division .

"Q. Were your proceedings as you have outlined them the ordinary proceedings that you took in such cases, and were they in accordance with your regular practice?—A. Yes."

The following also appears in Mr. Scovill's testimony (Tr. p. 70):

"* * * Q. Did you personally direct the Spangs to go ahead with the preparation of their plant?—A. I did.

"Q. Just what words did you use in that connection?—A. I probably said, go ahead as quickly as possible and get their production

up to 2,200 shells a day and to increase their facilities as would be suggested to them by Capt. Conklin, Lieut. Le Mieux, and Mr. Morrett.

"Q. The matter of how much they should expend for increased facilities was to be under the control of other officers?—A. In matters of that sort the question of expenditures was never considered.

"Q. Did you in other cases authorize the expenditures of money for increased facilities?—A. Yes, sir.

"Q. How many other cases would you say, off hand, a dozen?—A. Nearer a 100. Of course, you understand that I received my authority from Washington, from my chief, from my district chief and from a district chief's meetings. No precedent was established in Pittsburgh when this was done. It had been done before, and it was done afterwards, and you discussed the whole thing with your superior officers and they know that the Government was under obligations to take care of Spang & Co.'s increased facilities. You see at that time nobody had any intimation that hostilities would cease at that early date, and even if they had they had no business to speculate on it. Our function was to get ammunition by any hook or crook.

"Q. That was a part of your duty in general, to see that the facilities were increased where you considered it necessary to have the facilities increased?—A. It was a part of my duty to investigate concerns that were felt to be doing good work and report that to the proper authority in Washington, who in turn instructed me to tell them whatever the case might be, to go ahead and increase the facilities.

"Q. Did you say, when you told Spang & Co., that you were acting within the scope of your duties?—A. Yes, sir.

"Q. And that you had done that before several times?—A. Yes, sir.

"Q. And afterwards several times?—A. Yes, sir.

"Q. And when you told Spang & Co. to do this, you were acting under the express instructions of your superior?—A. Yes, sir.

"Q. You subsequently received the approval of your superior?—A. Yes, sir."

10. Maj. Robert A. Bruce, whose rank and assignment has been given, stated (Tr. p. 74 et seq.) as follows:

That in May or June, 1918, he conferred with Maj. Scovil with reference to Spang & Co., the claimant; that the initiative with reference to Spang & Co. increasing their facilities came from his office here in Washington, and that his work at that time was to secure the production of artillery ammunition by any means possible to secure it. That in the Production Division no contracts were negotiated, but the organization was such that the Procurement Division could not negotiate contracts with anyone who did not have the approval of the Production Division; that the Production Division were notified along in the spring of 1918 that shells were required in very much larger quantities, and that consequently the facilities would have to be increased all along the line; that in

line of that policy based on that need the Production Department planned to expand the production of contractors who were in production at that time, all of them to the very largest extent possible. In line with this policy they advised the Pittsburgh ordnance office to go ahead and told Spang & Co. to get ready to go into increased production pending negotiations of a contract. That at that time it required, after the negotiations were complete, an average of three months before the actual contract would be signed and in the hands of a contractor. The only way that any progress could be made was by officers of the Government, both in the Procurement Division and the Production Division to simply "take the bull by the horns" and advise people to go ahead and spend their own money while these negotiations were going on. Time, of course, was the essence of the whole proceeding, and that was the only way in which progress could be made. He further testified that Maj. Scovil took up with him definitely the proposition for increasing of the facilities of Spang & Co.

Witness further testified that it was an established practice at that time to authorize people with whom they were negotiating or intended to negotiate contracts to save time by going ahead and contracting for machinery; that he regarded such authorization as making an agreement with them, and testified particularly as follows (Tr., p. 81).

"The situation was just this: We had investigated Spang & Co.'s ability to run an organization and get production on shells. They were getting them. In other words, they were using such facilities as they had to the best advantage. There was an entire agreement among the responsible officers of the Ordnance Department in Washington, and in Pittsburgh, and the responsible men of the War Industries Board, that they were one of the ones that should be increased so far as their production capacity was concerned."

He further testified: That by responsible officer in Pittsburgh and in Washington he meant responsible officers in the Production and Procurement Divisions, and that Maj. Day was a responsible officer in the Procurement Division, as were Col. Hunt and Gen. Jamison in the Production Division. That he took up this very matter with Gen. Jamison, and that the letter of June 6, above quoted, written by him, was seen and approved and authorized by Col. Hunt, and that he had discussed this matter with Maj. Day, who was the contracting officer of the Procurement Department, on a number of occasions, and particularly on the occasion of June 22, 1918, in the district ordnance office at Pittsburgh, when Maj. Scovil was present.

11. In his testimony (Tr., p. 92) Lieut. Carpenter testified that in his conversation in the Pittsburgh district ordnance office with

Col. Bruce and Maj. Day the latter was definite, as far as the witness could recall, that Spang & Co. should be given a contract.

12. Maj. Day was unable to be present at the hearing, but his affidavit, which was received without objection in the testimony as Government Exhibit "D," says:

"You must remember that all contracts in the regular course of operations were verbal contracts, so to speak, sometimes for three months or more, due to the office routine, and regrettably few officers with the power to sign contracts.

"The proposition that Spang & Co. increase its facilities was discussed more than once. As I recollect, the proposition was to free them from their subcontractor position with the Standard Steel Car and make them a prime contractor. To do this on a basis to warrant the inspection force necessary would naturally call for increased production which could only be obtained by an increase in facilities. * * * I did discuss and seriously consider with favorable comments the proposition to either reduce the Standard Steel Car Co. 1,000,000 in view of their delinquency or let this contract stand and add a prime contract to Spang & Co.

"I did discuss several times with Lieut. Col. Bruce, and my personal recommendation was favorable to giving a contract to Spang & Co. for machining 155-millimeter shells. * * * From my general recollection of the situation and the conferences regarding this matter, I believe that Spang & Co. had every right, in view of the emergency, to lay their plans and get ready to take on an increased quantity."

13. Claimant alleges that it made expenditures and incurred obligations for increasing its facilities so as to increase its daily production from 1,500 to 2,700 shells, amounting to \$107,823.18, but the Pittsburgh District Claims Board held that this amount should be reduced to \$92,036.44 (Government Exhibit C, Tr., p. 103).

DECISION.

1. Upon the evidence before it this Board is of opinion that the negotiations which were carried on with the claimant for the extension of its plant beginning on or about April 19, 1918, by Col. Scovil, Lieut. Carpenter, Lieut. Corkran, and Engineer Sampson, officers assigned to the Pittsburgh District Ordnance Office, Production Department, were entirely within the scope of the respective duties of those officers and were approved and concurred in by Col. Bruce and Gen. Jameson, of the Production Division, and Maj. Day, of the Procurement Division, and that all the officials named were acting in all transactions pertaining to this case as officers or agents acting under the authority, direction, or instruction of the Secretary of War.

2. An agreement not executed in the manner prescribed by law was entered into between the United States and the claimant, which

comes within the purview of the act of March 2, 1919, known as the Dent Act, whereby, in consideration of the promise of the United States that the claimant would receive a prime contract for the machining of 500,000 shells, the claimant agreed to add to and extend its facilities as directed by the United States so as to give its manufacturing plant a capacity for machining and banding 700 155-millimeter shells per day more than said plant possessed at the time of making said agreement.

3. The claimant began the work of increasing its facilities in pursuance of the terms of such agreement early in the month of June, 1918, and continued same up to the time of the signing of the armistice on November 11, 1918, at which time it had made expenditures and incurred obligations on the faith of such agreement and for purposes connected with the prosecution of the war for which it is entitled to reimbursement by the United States.

DISPOSITION.

This Board will make and transmit a document setting forth the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular 17, revised, Purchase, Storage and Traffic Division, General Staff.

Col. Delafield and Mr. Eaton concurring.

Case No. 1854.

In re **CLAIM OF JOHN SIMMONS CO.**

- 1. ORAL AGREEMENT.**—Claim is made under the act of March 2, 1919, for \$456 for special equipment orally ordered by an authorized agent and delivered to the Government. Held, claimant is entitled to recover, but the exact amount can not be determined from the facts before the Board.

Mr. Patterson writing the opinion of the Board:

This case arises under the act of March 2, 1919. Statement of claim for \$456 was filed with the Board of Contract Adjustment of Edgewood Arsenal June 10, 1919. Neither Form A nor Form B was used in its entirety, but the allegations are sufficient to show that it is a class B claim. It was referred to this Board by the Director of Chemical Warfare Service as a Form B claim August 22, 1919.

The claimant by letter dated November 26, 1919, stated that it did not desire a hearing and, accordingly, no hearing was had.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. In September, 1918, P. M. Dinkins, a private in the United States Army, was assistant to the officer in charge of the setting up of chemical apparatus at Edgewood Arsenal, Hastings, N. Y. Said Dinkins was a chemical engineer and was charged with the duty of procuring necessary apparatus and material.

2. On or about September 4, 1918, said P. M. Dinkins telephoned claimant and ordered ten complete units of pipe and fittings to be supplied at said Edgewood Arsenal, Hastings, N. Y., identical with a previous order, No. EAH 125, with the exception of certain cocks covered by the previous order, at the agreed price of \$228.50 per unit, a total of \$2,285, delivery to be made in ten days. Pvt. Dinkins stated to claimant that the usual confirming order would follow. This transaction was in accordance with an established course of

business between the Edgewood Arsenal, at Hastings, and claimant, claimant having on previous occasions accepted orders over the telephone from Dinkins who was known to it.

3. Claimant proceeded with the manufacture of the articles covered by said order. About 90 per cent was ready for shipment when, at a date which does not definitely appear, Dinkins telephoned the claimant and requested it to cancel the unfilled portion of said order. Claimant replied that it would stop work at once and keep such pipe and stock fittings as it had assembled, but that the plates, hoppers, and wrenches covered by said order had been made up specially and could not be used for stock. It was thereupon agreed between claimant and Dinkins that claimant should deliver the completely-made articles and cancel the order as to the residue.

4. Claimant accordingly shipped to Edgewood Arsenal, Hastings-on-Hudson, the following articles as set forth in the invoice attached to this statement of claim:

(Copy.)

JOHN SIMMONS Co.

110 CENTRE STREET, NEW YORK.

Sold to Edgewood Arsenal, No. C 22614, Hastings, N. Y.:

Oct. 8th, 1918.

Rec. 34829. To Hastings on Hudson, N. Y. Shipped 10/8 via boat.			
20-C 1 plates 1' 6" thick A 12919-----	11 00 ea net		220 00
10 sheet-iron hopper A 12921-----	6 00 " "		60 00
16 wrought-iron wrenches for cocks-----	6 00 ea 96 00		96 00
10 conical plug (cast iron)-----	8 00 ea net		80 00
			456 00

Certified correct and just. Payment not received.

JOHN SIMMONS COMPANY,
H. J. ECKHOFF,

Ass't Treas.

5. The evidence before this Board is not sufficient to enable it to determine the sum which claimant is entitled to receive for the articles delivered and accepted as aforesaid.

CONCLUSION.

There was an agreement within the purview of the act of March 2, 1919, between the United States of America, acting by Pvt. P. M. Dinkins, aforesaid, and the claimant, John Simmons Co., whereby the United States agreed to purchase from the claimant the articles mentioned and set forth in Finding of Fact IV, and the United

States of America through Pvt. Dinkins aforesaid, agreed to pay claimant the reasonable value thereof.

DECISION.

This Board will make and transmit statement of the conditions and terms of the agreement and certificate C to Claims Board, Chemical Warfare Service, for action in the manner provided by Specification (c) section 5, Supply Circular No. 17 (revised), Purchase, Storage and Traffic Division, March 26, 1919.

Col. Delafield and Lieut. Col. Williams concurring.

Case No. 1877.

In re **CLAIM OF APFELBERG, ROSENBLATT & CO.**

- 1. LABOR—MATERIAL—FACILITIES—REIMBURSEMENT.**—Where claimant made expenditures for labor, material and facilities, preparatory to performing a contract to manufacture 30,000 pair of trousers for the United States Government at 75 cents each, there is no obligation under the act of March 2, 1919, to reimburse claimant for its loss in such expenditures where the evidence shows that no such contract was made.
- 2. CLAIM AND DECISION.**—This claim arises under the act of March 2, 1919, for reimbursement for expenditures made for labor, material and facilities preparatory to performing an alleged agreement to manufacture 30,000 pairs of trousers. Held, the evidence failed to establish the alleged agreement and the claimant is not entitled to the relief sought. Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 for \$5,364 damages sustained upon a contract alleged to have been entered into between the claimant, Apfelberg, Rosenblatt & Co., 570 West Broadway, New York, and the Quartermaster Corps, United States Army, on or about November 1, 1918, for the manufacture of 30,000 pairs of trousers from Government-owned materials.
2. Sometime during the month of September, 1918, the claimant filed a bid for the manufacture of 60,000 pairs of trousers. Late in October and after the bids were opened, the Board of Contract Review, the highest contracting authority at the New York office of the Quartermaster Corps, approved the recommendation of an award to the claimant of a contract for the manufacture of 30,000 pairs of trousers.
3. Before an award could be made in accordance with this recommendation, it was necessary to obtain the approval by the office of the Quartermaster General at Washington.
4. In its November 1, 1918, issue a trade newspaper published an announcement, stating that such an award had been made to the claimant who immediately called upon Mr. Harry L. Wells, Acting Chief of the Uniform Section, Clothing and Equipage Division, Quartermaster Corps, New York, to ask if the preparation of the

notice of award or the written contract and delivery of uncut material to his company could be expedited. He incidentally complained that the award was not for 60,000 pairs, the number of trousers to manufacture which he had submitted a bid.

5. Mr. Wells testified that he told the claimant that he could not then deliver materials nor could he do anything to expedite the preparation of the contract. Mr. Wells also testified that under the circumstances as then existing, the only action he could have taken would have been to telegraph the office of the Quartermaster General, asking for immediate action upon this recommendation. In view of the fact that the claimant had at least 16,000 garments more to make under its existing contract for 25,000, Mr. Wells did not feel the situation demanded exceptional treatment and so advised the claimant.

6. The claimant asks the difference between the cost and the market price of the following items:

Sewings (trimmings), costing-----	\$1,000
Lining, costing-----	300
Special machinery (pressing machine), costing-----	325
Other machinery, costing-----	2,839
Rental of loft for four months from Nov. 12, 1918-----	500
Salaries paid to employees after Nov. 12, 1918-----	1,264

7. The claimant states that it had manufactured approximately 16,000 pairs on the contract on which it was then engaged when production was suspended on November 12, 1918. A cancellation agreement has been entered into with the claimant and it has executed a release to the Government on account of that contract.

8. The charge for the rent of the loft grows out of the fact that the claimant found it necessary to store therein Government-owned materials which had been delivered to it for the performance of that portion of its existing contract which was suspended. The machinery items were procured for the performance of that contract.

DECISION.

1. Independent of the actual existence of the contract here alleged, it can not be held that the machinery items or rent of the loft or money paid to employees is in any way upon the faith of such a contract.

2. The claimant states that shortly after production was suspended under its existing contract, it was advised by two Government inspectors to hold itself in readiness to continue performance. They stated, it is alleged, that the suspension of production was temporary. Whether a liability for the expenditures on account of which claim is here made could properly be imposed upon the Government be-

cause of the recommendation of inspectors, if actually made, is not before us in the present case, because such expenditures were chargeable to the contract, the performance of which was suspended and the resumption of the performance of which was the subject of conversation between the claimant and inspectors.

3. The demands for reimbursement to cover the difference between the cost of sewings and lining, and their market value, remain to be considered.

4. The testimony with respect to the sewings and lining is that after the conversation with Mr. Wells, Mr. Apfelberg told his partner that they had been awarded a contract for the manufacture of 30,000 pairs of trousers, and that the partner thereupon procured the trimmings and linings necessary for its performance. The partner testified that this action was taken on the day following Mr. Apfelberg's conversation with Mr. Wells, "during the latter part of October," and prior to the newspaper announcement that an award had been made to the claimant.

5. Mr. Wells testified that at no time, neither before nor after November 1, did he state to the claimant that a contract had been awarded to it for the manufacture of an additional 30,000 pairs of trousers. The Board is of the opinion that the claimant has failed to show cause justifying an award in any amount.

Col. Delafield and Mr. Harding concurring.

Case No. 739.

In re CLAIM OF OLIVER IRON & STEEL CO.

1. **ORAL AGREEMENT—INSTRUCTIONS NOT TO WAIT FOR FORMAL CONTRACT—MEASURE OF ADJUSTMENT.**—Where a duly authorized agent of the War Department gave claimant an oral order for articles to be manufactured, in the amounts and at the prices stated in claimant's written offer, with instructions to proceed without waiting for a formal contract, and claimant manufactured the articles before November 12, 1918, claimant is entitled to recover the contract price of the articles less their reasonable salvage value.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for agreed price of articles, less their salvage value, manufactured on the oral order of a lieutenant of Engineers, U. S. A., and countermanded after the manufacture, but before delivery. Held, claimant entitled to relief under the act.

Mr. Harding writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$5,850, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On October 28, 1918, the Oliver Iron & Steel Co., at the request of Joseph B. Montgomery, captain of Engineers, submitted prices for the manufacture of certain hot pressed hexagon tapped nuts. U. S. Standard, as follows:

Stock No.	Quantity.	Size.	Unit price per 100 pounds.
	<i>Pounds.</i>	<i>Inch.</i>	
2368.....	18,000	$\frac{1}{2}$	\$13.50
2368.....	18,000	$\frac{3}{4}$	10.10
2368.....	18,000	$\frac{1}{2}$	8.50
2368.....	18,000	1	8.40

2. On October 31, 1918, Norman Foy, Lieutenant of Engineers, U. S. Army, an officer acting under the authority, direction, or instruction of the Secretary of War, placed an oral order with the

claimant, Oliver Iron & Steel Co., through its agent, H. L. Usher, for the 72,000 pounds of hexagon tapped nuts, in the sizes, amounts, and at the price fixed in the order, and told the said H. L. Usher that it was desired that the said Oliver Iron & Steel Co., the claimant, should proceed at once to their manufacture.

3. Claimant, the Oliver Iron & Steel Co., did proceed at once to the manufacture of the nuts in question, and they were all manufactured and ready for delivery prior to November 12, 1918. On December 3, 1918, and before delivery of any of the nuts in question, the Government countermanded the order. Lieut. Foy in giving the order acted under the orders or instructions of his superior officer, Lieut. Col. James E. Long, Engineers, U. S. Army, and states that he was instructed to have the claimant proceed immediately with the fulfillment of the order without waiting for a formal written order.

4. The claimant, Oliver Iron & Steel Co., claims to have expended in and about the manufacture of the 72,000 pounds of nuts in question the sum of \$7,290, and claims that there was a salvage, for which credit should be given, of \$1,440, leaving balance of the claim \$5,850.

DECISION.

1. The above statement of facts constitutes a contract between the claimant and the United States to be adjusted under the act of March 2, 1919.

DISPOSITION.

This Board will formulate a document setting forth the nature terms, and conditions of the agreement between the claimant, Oliver Iron & Steel Co., and the United States, and will execute its certificate, Form C, as prescribed in Supply Circular No. 17, revised on March 19, 1919, and will draw up a statutory award causing the same to be paid.

Col. Delafield and Mr. Howe concurring.

Case No. 545.

In re CLAIM OF STOWE & WOODWARD CO.

1. **AWARD BY ARBITRATION COMMITTEE—MISTAKE IN.**—Where claimant had a formal written contract for the manufacture of raincoats, which provided that in the case of labor disputes the Government might appoint an arbitration committee, whose decision should be binding on the contractor and the Government, and during the performance of the contract there was a labor dispute, and the Government appointed an arbitration committee, which committee increased the pay of the employees, but where, through a typographical error, the name of claimant was omitted, claimant should seek to have the arbitration committee amend the award so as to include claimant's name and then present proper vouchers to the finance officer for payment in the usual manner.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$1,561.98 to recover the amount of increased wages claimant paid by reason of an award made by an arbitration committee appointed by the Secretary of War, according to the terms of its formal contract. Held, relief should be sought by a petition to the arbitration committee to correct a mistake in its award, and that relief can not be granted under the act of March 2, 1919.

Mr. Shirk writing the opinion of the board.

STATEMENT OF FACTS.

1. This case comes before this Board under a petition on Form B under the act of March 2, 1919, for the sum of \$1,561.98. It appears, however, that the claimant has a contract, No. 6405-B on Q. M. C. Form No. 108 H, executed in the manner prescribed by law; and that therefore this Board can not grant any relief under the act of March 2, 1919, and that if it can grant any relief at all it must be under G. O. 103, W. D., 1918.
2. Contract No. 6405-B, dated September 21, 1918, between S. W. Shaffer, Major, Q. M. C., and the claimant is for the furnishing and delivery to the United States of approximately 19,400 raincoats (foot) at \$5.58 each. That contract provides:

"Labor disputes.—In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries and the Secretary of War shall have requested the contractor to submit such dispute for settlement, the contractor shall have the right to submit such dispute to the Secretary of War or his duly authorized representative for settlement. The Secretary of War or such representative may thereupon settle or cause to be settled such disputes, and the

parties hereto agree to accede to and to comply with all the terms of such settlement.

"If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in asking such settlement and as a part thereof may direct that a fair and just addition to the contract price shall be made therefor; provided, however, that the Secretary of War or his representative shall certify that the contractor has in all respects lived up to the terms and conditions of the contract or shall waive in writing for this purpose only any breach that may have occurred.

"If such settlement reduces such labor costs to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price.

"No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement.

"Every decision or determination made under this article by the Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto."

3. On November 1, 1918, Maj. F. W. Tully, of the Office of the Secretary of War, telegraphed to the claimant, care of William H. Lichtenstein, as follows:

"Labor disputes have arisen which directly affect the performance of your contracts with the Government and which are causing and are likely to cause delay in making the deliveries. The Secretary of War requests you to submit such disputes for settlement to Honorable Julian W. Mack, Major Samuel J. Rosensohn, and Professor William Z. Ripley, who are his duly authorized representatives for purpose of settling such disputes under terms of such contract. In such submission you must agree to accede to and comply with all the terms of such settlement. The above-named representatives of the Secretary of War will have the power to direct that a fair and just addition to the contract price shall be made in case an increase in wages is granted and to require a deduction to be made from the contract price in case the labor costs are reduced. By order of the Secretary of War."

4. On November 4, 1918, the three arbitrators mentioned met at the Bar Association, New York City. Mr. Lichtenstein was present representing this claimant among other manufacturers. The minutes of that meeting do not disclose what particular claims were under consideration. After a discussion of the situation the board retired and then returned to render its decision. The minutes of the meeting from that point read as follows:

DECISION.

"In rendering decision, Judge Mack stated that the presentation had been very unsatisfactory to him and that there were less facts

presented than in any arbitration proceedings in which he had ever participated. He stated, however, that the arbitrators had done the very best that they possibly could and, in making a decision, they had not only taken into consideration the little facts which were presented by the workers and the firm, but also the knowledge which the arbitrators had gained from a personal examination and inspection as well as a careful comparison of both the old and new garments. The award is as follows:

"1. The Government is to pay the increase awarded.

"2. The cementers are entitled to a higher percentage of increase than the operators.

"3. Seven cents (7c) has been decided on as an increase for both the stitchers and the cementers. The prices are, therefore, fixed at 73c for stitching and 52c for cementing. Readjustment of these prices is to date back to September 9th, 1918."

5. Thereafter the arbitrators made an award in the following language:

"WAR DEPARTMENT,
Washington, December 28, 1918.

Memorandum of award by the arbitrators appointed by the Secretary of War on October 31, 1918, for the purpose of settling dispute between the manufacturers and their workers.

WHEREAS under the contracts between the Hub Raincoat Company, Crown Raincoat Company, American Rubber Company, Factory M American Rubber Company, Factory E American Rubber Company, North Plant C & C Raincoat Company, and H. B. Gordon Company, respectively, and the Government for the manufacture of Army slickers,

IT IS PROVIDED, that where disputes shall be submitted by the manufacturers to the Secretary of War or to his duly authorized representatives, at the request of the Secretary and by the award duly made in settling such dispute, the manufacturer is required to pay labor cost higher than that prevailing in the performance of the contract immediately prior to such settlement, the Secretary of War or his representative may direct that a fair and just addition to the contract price may be made therefor; and

WHEREAS the above-named manufacturers have duly submitted their dispute to the undersigned as representatives of the Secretary of War for settlement; and

WHEREAS by the award made the said representatives have directed an increase in the price of 14 cents per garment to be paid to the workers, thus increasing the labor cost to the said manufacturers by that amount:

IT IS DIRECTED, as a part of the adjustment made by us, that a fair and just addition to the contract price shall be made therefor to the extent of the actual increased cost, upon proof by affidavit of the actual amount of increased cost.

IT IS FURTHER CERTIFIED, that the contractors named therein have in all respects lived up to the terms and conditions of the contract.

and to the extent to which they have not done so such breach may be waived for this purpose only.

Representatives of the Secretary of War:

JULIAN W. MACK.

SAMUEL J. ROSENSOHN.

Major, J. A. G., Office of the Secretary of War.

WILLIAM Z. RIPLEY,

Administrator of Labor Standards for Army Clothing."

6. It will be noted that the claimant is not mentioned in that award. Maj. Samuel J. Rosensohn, one of the arbitrators, has made an affidavit for this board, verified December 16, 1919, in which he says, among other things:

"It was distinctly our intention to include the claimant in the award which directed an increase in the price of fourteen cents (14¢) per garment to be paid to the workers, but through a mistake in the certificate that name was not included. The only persons of those who had signed the submission on October 31st who were not included in the award were those whose contracts did not contain a provision permitting the Secretary of War to make the adjustment. The Stowe & Woodward Company, as appears from the telegram addressed to me on October 31st, 1918, had a contract which contained a clause permitting the Secretary of War to adjust the dispute, and it was the purpose of our Board to include that company."

Judge Mack also has written to this Board under date of November 21, 1919, in which he says:

"In view of the telegram of November 1st from Major Tully, attached to the documents, my opinion would clearly be that there was a stenographic omission in the memorandum of award, in that the name of this company was omitted."

Prof. Ripley also has written this Board as follows:

"Concerning the enclosed claim of Stowe & Woodward, the documents appear to authenticate their claim for increased compensation. I have no memorandum at hand, but it seems as if their claim were valid."

We have little doubt, therefore, but that the name of the claimant was inadvertently omitted from the memorandum of award of December 28, 1918.

7. Under date of March 14, 1919, the claimant and the United States entered into a formal contract cancelling said contract No. 6405-B, wherein the claimant released the United States from all claims pertaining thereto.

"excepting any sum or sums of money that may now or hereafter become due or owing to the contractor from the United States by reason of an award of the Secretary of War in the matter of increased cost of wages caused by ruling of the War Labor Board."

OPINION.

1. It may be that this Board would have authority under G. O. 103 to settle labor disputes and to award an additional sum under said formal contract No. 6405-B were it not for the fact that the Secretary of War appointed three arbitrators for that express purpose. We think that that fact clearly negatives the idea that this Board has that power. Our remarks, therefore, should be considered solely as recommendations to the claimant.

2. We think the claimant should request the three arbitrators to amend their memorandum of award of December 28, 1918, to include this claimant and to show that the increase is to be retroactive from September 9, 1918. After the amendment of the award the claimant should present proper vouchers through the finance officers of the Government for payment in the usual manner.

Col. Delafield and Mr. McCandless concurring.

Case No. 1677.

In re CLAIM OF ST. LOUIS WOOD PRODUCTS CO.

1. **ORAL AGREEMENT.**—Where claimant's witness testified that the Government officer gave him an oral order for 100,000 boxes, and the Government officer positively denied it, there is doubt as to whether or not there was an agreement.
2. **EXPENSES AFTER NOVEMBER 12, 1918.**—In this case, however, if there was such an agreement, claimant would not be entitled to recover because its only obligations or expenses incurred were admittedly of date of November 14, 1918.
3. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$1,881.36, expenses incurred in preparing to perform an oral order. Held, claimant is not entitled to recover.

Lieut. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim arises under act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1918, for \$1,881.36 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. It appears that the Packing Container Section of the Ordnance Department, Washington, D. C., under date of October 28, 1918, requested manufacturers to submit prices on packing boxes for 6-inch Stoke Trench Mortar Shells. The claimant company was one of the manufacturers to whom this request was sent. On the same day the claimant company submitted prices to the department. The claimant alleges that on November 8, 1918, Lieut. Webb, of the Packing Container Section of the Ordnance Department, gave its representative, Mr. J. P. Larson, an oral order for 100,000 of these boxes at a price of 77 cents each, and that Lieut. Webb further stated that a procurement order was being prepared and would be mailed for the amount stated.

3. Lieut. Webb in a sworn statement submitted to this Board stated, with reference to this alleged oral order, in part as follows:

"A representative—name not remembered—of the St. Louis Wood Products Company was a consistent caller at the Packing Container Section, the Procurement Division, endeavoring to secure an order on his bid for 6-inch Stoke shell boxes. This, as I remember, was the first

part of November, 1918. We were negotiating for some 2,000,000 such boxes, upon which urgent delivery was required by the Production Division.

"This representative called one day and fairly insisted that he know whether or not his company was to receive an order. He was informed that we could not close the deal at that time, but that approximately 200,000 were needed in the territory where he was located, and that his price at that time would warrant our placing an order for 200,000 with him. He called later, when I informed him that when we were in a position to give him an order it would be for 100,000 boxes, rather than 200,000.

"So far as I am able to recall this is the conversation I had in Washington with the St. Louis Wood Products Company's representative."

4. No procurement order was ever issued for this material. Under date of November 19, 1918, the department, through Lieut. Webb, telegraphed claimant to incur no expenses in connection with the alleged oral order. It further appears from the record that claimant, on November 14, 1918, obligated itself and made commitments in the sum of \$1,881.36, based upon the faith of the alleged oral order. Claimant further states that the goods, for which it makes claim against the Government, were purchased on November 14, 1918. (Exhibits 6 and 7.)

DECISION.

1. In view of the statements made by Lieut. Webb as to the conversation that took place between him and the claimant's representative on or about November 8, 1918, there is doubt as to whether or not there was an informal agreement for the purchase of 100,000 of these boxes from the claimant, but if it be granted that the circumstances surrounding the negotiations that took place were such as to justify the conclusion that an oral agreement was actually entered into for the purchase of this material it is evident from the record that claimant did not make its purchase upon the faith of the agreement until November 14, 1918. This is admitted by the claimant in a sworn statement to this Board. This being true, it would appear that the Secretary of War would not have authority to settle this claim under act March 2, 1919.

2. The act provides, in part, as follows:

"That the Secretary of War is authorized to pay or discharge any agreement, express or implied, that has been entered into in good faith prior to November twelfth, nineteen hundred and eighteen, * * * when such agreement has been performed in whole or in part, or expenditures have been made, or obligations incurred upon the faith of the same by any such person prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law."

3. Thus, it is clear that if the agreement was entered into some expenditures must have been made, or obligations incurred, upon the faith of same prior to November 12, 1918. From this record it is clear that the only expenditures were made subsequent to November 12, and in the absence of any evidence to show that any part of the agreement was performed prior to November 12, or any expenditures made or obligations incurred upon the faith of same prior to November 12, 1918, that the Secretary of War is without authority to grant relief.

4. For the reasons stated, therefore, the relief sought for is denied.

Col. Delafield and Mr. Bayne concurring.

Case No. 2204.

In re **CLAIM OF MODERN PANTS CO.**

1. **NO AGREEMENT.**—Where the Government notified claimant, who was then performing Government contracts for the manufacture of woolen trousers, that thereafter contracts would be issued only after the submission of bids, and claimant's representative talked with Lieutenant Mann of the Quartermaster Corps, protesting against being required to submit bids, and claimed that Lieutenant Mann told him that his factory would be kept busy, this being denied by Lieutenant Mann, there is no agreement on the part of the Government to reimburse claimant for commitments made.
2. **RELEASE.**—In such a case, especially is there no liability on the part of the Government, claimant having settled its formal contracts and stated in such settlement papers that it agreed that it had no other claims against the Government.
3. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$19,274.62 for extra commitments made because of an alleged statement by Lieutenant Mann that claimant's factory would be kept busy. Held, claimant not entitled to recover.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage, and Traffic Division Supply Circular No. 17 by the Modern. Pants Co., 194 Front Street, Worcester, Mass., for \$19,274.62 damages sustained by the claimant upon a contract alleged to have been entered into with the Government on or about September 9, 1918, for the manufacture of 64,000 pairs of woolen trousers from Government-owned materials.

2. During the summer of 1918 the claimant was engaged in the manufacture of cotton breeches for the Government. On or about August 18, 1918, contract No. 5652-B for 90,000 pairs of woolen trousers was awarded to the claimant. Early in September, 1918, the claimant learned that as to future contracts the Government would require prospective contractors to submit bids, and that contracts would be entered into with the lowest responsible bidder.

3. On September 8 or 9, 1918, when the claimant was still engaged in the production of cotton breeches under the existing contract and had not yet begun the manufacture of woolen trousers under the

contract for 90,000 pairs, Mr. Max Grodberg, one of the partners of the claimant company, called on Lieut. Lawrence S. Mann, Quartermaster Corps, United States Army, Chief of the Manufacturing Branch, Clothing Section, Zone Supply Office of the Quartermaster Corps at Boston, and asked for information about the reported change in practice of the Government in arranging for the manufacture of clothing.

4. The testimony shows that Lieut. Mann explained to Mr. Grodberg that contracts would thereafter be awarded to successful bidders, whereupon Mr. Grodberg asserted that he had done satisfactory work for the Government on several contracts, and that he should not now be required to enter into competition for additional work. Mr. Grodberg complained that as he could not know in advance the price bid by his competitors he might be unsuccessful, and thus seriously injured.

5. Mr. Grodberg testified that Lieut. Mann assured him that the claimant's plant would always be used by the Government and that because of its past performances contracts would be placed with it for the manufacture of clothing without regard to the price or conditions under which he might submit a bid. Lieut. Mann denied having made any such statement to Mr. Grodberg.

6. When necessity of adopting a theory upon which to predicate this claim was impressed upon the claimant and when he was asked to indicate the conversations or the acts of the Government constituting a contract, express or implied, counsel stated that the claimant would rely upon the conversations with Lieut. Mann on September 8 or 9 at which the Government, through Lieut. Mann, promised that the claimant's plant would be kept busy in the performance of Government contracts regardless of whether or not, upon the opening of bids, this claimant's offer was more favorable to the Government than those of his competitors.

7. In the presence of Mr. Grodberg, the claimant's counsel stated that the submission of bids late in September, 1918, was for the purpose of appearing to comply with the new requirements of the Government, but that it was in no way regarded as affecting its agreement with Lieut. Mann of September 8 or 9 upon which it confidently relied.

8. The claimant alleges that upon the faith of the agreement alleged to have been entered into with Lieut. Mann it made expenditures and incurred obligations in creating facilities with which to manufacture 64,000 pairs of woolen trousers and against loss on account of which it now asks the protection of the Government to the extent of \$19,274.62.

9. The claimant does not allege a definite number of trousers to have been mentioned during his conversation with Lieut. Mann, nor

is it clear why the claimant attempts to set up a contract for 64,000 pairs, the number for which the Boston office of the Quartermaster General recommended an award to this claimant. The recommendation for award was forwarded for action and the claimant was notified by the Boston office on November 2, 1918, that the New York office of the Quartermaster General had transmitted its recommendation to Washington with the approval of that office.

10. During the course of its consideration, "No. 7862-B" was attached to the recommendation and under date of February 8, 1919, Lieut. Mann, then engaged in the settlement of Government obligations under suspended contracts, sent a circular letter to the claimant which referred to a possible claim under this contract. The claimant also contends that this letter recognizes the existence of the contract as alleged.

11. Under contract No. 5652-B for the manufacture of 90,000 pairs of trousers this claimant has been paid \$8,833.44 to cover the unabsorbed amortization of facilities and the depreciation in value of materials especially procured for the performance of that contract. It is stated upon receiving that amount Mr. Grodberg agreed that the claimant had no other claims against the Government.

12. All of the facilities and materials alleged to have been procured by the claimant for the manufacture of 64,000 pairs of woolen trousers under the present contract would have been required by the claimant in the performance of contract No. 5652-B.

DECISION.

1. There is nothing in the record to establish the existence of a contract between the claimant and the Government for the manufacture of 64,000 pairs of woolen trousers. It is true that the claimant was invited on September 11, 1918, to submit a bid for the manufacture of trousers and did so and that the Boston Board recommended an award and that this award was approved by the New York office and transmitted to Washington for final action. Before such action could be taken the armistice was signed and the need of additional uniforms ceased to exist.

2. The testimony of the claimant as to the blanket agreement alleged to have been entered into with Lieut. Mann on September 8 or 9 under which its plant was to be kept continuously in operation in the manufacture of woolen trousers, all of which testimony is completely denied by Lieut. Mann, can not be regarded as sufficient proof of an agreement with the Government which may be adjusted under the act of March 2, 1919, and it is the opinion of this Board that the claimant has failed to show cause justifying an award in any amount.

Col. Delafield and Mr. Smith concurring.

Case No. 2257.

In re **CLAIM OF WALTER SODERLING (INC.).**

1. **EXPERIMENTAL WORK—IMPLIED AGREEMENT.**—Where claimant has a formal order for masks, and during the life of it changes were made, at the instance of an authorized agent of the Government, which changes required further experimental work and traveling expenses, there is an implied agreement on the part of the Government to reimburse claimant therefor.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$2,818.56 for experimental work made necessary by changes made in a formal order. Held, claimant is entitled to recover.

Lt. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Supply Circular No. 17, 1919, for \$2,818.56, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. During the early part of 1918, the Air Service, United States Army, was in need of a special mask which would supply oxygen in the higher altitudes and which at the same time had installed in it a transmitter for wireless telephone.

3. The Science and Research Division, Bureau of Mines, was called upon to make an investigation and develop such a mask for the Production Division of the Signal Corps.

4. Dr. J. A. E. Eyster, at that time connected with the Science and Research Division of the Bureau of Mines, was detailed upon this work in conjunction with the Science and Research Division of the Signal Corps and the Production Division of the Signal Corps.

5. Dr. Eyster took the matter up with different manufacturers and finally, through the King Optical Co. of New York, made the acquaintance of Mr. Walter Soderling.

6. During the experimental stage Mr. Soderling, Dr. Eyster, and Mr. Minton, who was connected with the Western Electric Co., had certain consultations, and the result was that Mr. Soderling was instructed to go ahead and perfect his mask, with the understanding that he would be given a contract for quantity production.

7. On April 10, 1918, Walter Soderling (Inc.) received order No. 73406 from the Director of Aircraft Production to manufacture 10,000 rubber oxygen masks according to the sample theretofore furnished by Walter Soderling (Inc.).

8. On April 20, 1918, when claimant was prepared to enter into quantity production of the above masks he received orders from the Aircraft Production, through Lieut. E. A. Hults, to change the specifications. As a result considerable experimental work was done and considerable outlay of money made.

9. Thereafter the order No. 73406 was cancelled.

10. On July 9, 1919, the Government effected a settlement agreement with the claimant, who reserved the right, however, "to file an additional claim under the Dent Act of March 2, 1919, for expenditures alleged to have been incurred in experimental work under said original contract." (Article III, Settlement Contract.)

11. In the settlement of the original claim filed by Walter Soderling (Inc.) on June 28, 1919, payment was made for Mr. Walter Soderling's time.

12. They did not, however, pay for the additional labor on molds amounting to \$279.92, nor did they pay for materials and tools amounting to \$317.64. (Tr. p. 22.)

13. In the claim as filed there is a charge for trips to Washington, \$175. However but two trips were made with reference to this change of specifications and the charge therefore is \$25 a trip, or a total of \$50.

DECISION.

1. In the instant case in its settlement contract with the Government the claimant company reserved the right specifically to file an additional claim under the Dent Act of March 2, 1919, for expenditures alleged to have been incurred in experimental work under said original contract. It is therefore clear that this Board has jurisdiction to entertain this case and pass upon the merits thereof. (*Cramp & Sons v. United States*, 216 U. S., 494.)

2. The claimant was instructed after he received his original order to change the specifications by putting in metal reinforcements. (Testimony of Capt. E. A. Hults, Tr. pp. 48-49.)

3. When claimant company through its president, Walter Soderling, received these instructions and proceeded to make the experiments and do the work called for by the instruction to change the specifications, an implied agreement arose upon the part of the Government to pay claimant company for the necessary labor, tools, and expenses, including the two trips to Washington, that were incurred in complying with these instructions.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form C to the Claims Board, Air Service, for action in accordance with this decision.

Col. Delafield and Mr. Howe concurring.

Case No. 401.

In re JOSEPH A. BYRNES.

1. **RESPONSIBILITY FOR CARE OF RENTED EQUIPMENT.**—Where the Government hired claimant's teams, plows, and other equipment for leveling an aviation field at a rental that included the feed and care of the mules, but for claimant's convenience erected stables for same on the field, and due to the muddy condition of the stables some of the mules died and some became diseased, in the absence of an agreement by the Government to care for, or be responsible for, claimant's mules and equipment, claimant is not entitled under the act of March 2, 1919, to reimbursement on account of such mules or on account of stolen equipment.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for loss of mules and equipment hired by the Government under an oral contract. Held, claimant is not entitled to relief.

Mr. Patterson writing the opinion for the Board.

FINDINGS OF FACT AND DECISION.

This case arises under the act of March 2, 1919. Statement of claim, approximately in Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular 17, 1919, for \$3,230.50, by reason of an agreement alleged to have been entered into between the claimant and the United States of America.

As originally presented by claimant on November 11, 1918, to the general manager, McCook Field, the claim was made up as follows:

1. Rental of blacksmith "outfit" sent from Moraine City to McCook Field, June 24, 1918, 3 months, at \$60-----	\$180.00	
Grindstone and tools missing-----	90.00	\$270.00
2. Plows, scrapers, harness, etc., claimed to have been misappropriated, rental of additional wagons, etc-----	612.00	
3. Loss of five mules, deterioration of eight others through disease, and veterinary bills-----	2,200.00	
4. Wages paid employees, claimed to be chargeable to Government, under agreement-----	386.25	
		3,198.25
		3,468.25

As filed with this Board, the claim is limited to loss and injury to mules, loss of plows, scrapers, and harness, a balance claimed to be due for rental of plows and wagons, and rental of blacksmith "outfit," the various items totaling \$3,230.50.

A hearing was held at the office of the board on November 21, 1919. Subsequently, at claimant's request, depositions of additional witnesses were taken at Cincinnati, Ohio, on December 23, 1919, and at Dayton, Ohio, on January 6, 1920, the Government attorney in charge of the case attending on both occasions. All the witnesses examined at Cincinnati and Dayton were produced and called by claimant, with the exception of Charles F. Simmons, previously examined at the hearing in Washington and recalled by the Government attorney.

FINDINGS OF FACT.

The Board finds the following to be the facts:

I.

At the times hereinafter mentioned claimant was engaged in business at Cincinnati, Ohio, as a general contractor for grading and excavating work, and owned an equipment consisting of about 105 mules, 3 horses, 45 scrapers, 4 plows, 14 wagons, 50 sets of harness, 4 tents, and other miscellaneous articles. Charles F. Simmons, a civilian employed by the Bureau of Aircraft Production, was factory manager at McCook Field, near Dayton, Ohio. His duties included the construction and maintenance of the buildings and grounds and preparation of the flying fields. F. L. Riehle, also a civilian, was purchasing agent at McCook Field, under Capt. H. E. Blood, who was in charge of the Business Section, Bureau of Aircraft Production. He had written instructions from Capt. Blood authorizing him to enter into agreements for purchasing materials and for labor.

II.

In or about the month of June, 1918, claimant was engaged in work at Moraine City, near Dayton, Ohio. Some of his teams and equipment, however, were working upon McCook Field in the name of K. B. Allen. Said Allen was a civil engineer and contractor of Dayton, Ohio; he was not an officer or agent of the Government and had no authority to make contracts or agreements on its behalf.

III.

More teams and equipment being required for the work of leveling and preparing McCook Field, the authorities having charge thereof learned from said Allen that claimant possessed a suitable equipment therefor. Accordingly, at some date shortly prior to June 24, 1918, Simmons and Riehle, aforesaid, called on claimant at his office in Cincinnati and discussed the matter of his bringing

his entire equipment to McCook Field from Moraine City. An agreement was made at this interview between claimant and Simmons, acting on behalf of the Government, which included the rates to be paid for mule teams and drivers, scrapers, plows, saddle and buggy horses, wagons, and other equipment. It was also agreed that the Government should provide and build at the field stables and watering places for animals, cook shed and bunk house for the drivers and other men employed by claimant. There was no requirement on the part of the Government that the teams or other equipment should be kept at the field when not actually working, and the construction of the stables and other buildings aforesaid was undertaken by it solely for claimant's convenience and in order that his men and animals might be as near their work as possible. It was further agreed that claimant should recommend a foreman, who should be employed by the Government and placed upon its pay roll.

It was also agreed, in order to facilitate matters and save book-keeping, that the teams and equipment of certain other contractors, then working at McCook Field, should be put in claimant's name, he to receive payment therefor and settle with the owners.

IV.

Thereafter, and on or about June 24, 1918, claimant moved all of his equipment not already at McCook Field thither from Moraine City. He recommended as foreman a former employee of his, one Harry Gleason, who was placed on the Government pay roll and assumed direction of the work of claimant's teams and general supervision over them and their drivers and other persons employed by the claimant. Gleason continued as said foreman until some time in August, 1918, when he engaged in business there as an independent contractor. The corral, stables, and other buildings agreed upon were built by the Government and occupied by claimant's drivers and animals and by the other teams and drivers employed under claimant's name.

About August 1 claimant brought to Simmons's attention the fact that an epidemic of glanders was prevalent among the animals from Dayton and at claimant's request, the Government provided separate watering places for the exclusive use of claimant's animals at the field.

Gleason, in accordance with instructions given him by Simmons, either directly or through the latter's regular intermediaries, designated from time to time what work was to be performed by the various teams and equipment and upon what parts of the field, and which teams were to be worked upon any given day. He was not

charged with the care of the animals when not working. In addition to Gleason, claimant at various times recommended other foremen who were employed by the Government and placed upon its pay roll. Among these was one Emil Hoffman, whom claimant designated as his personal representative and who checked up with the timekeepers employed by the Government the sums due claimant, which were paid weekly upon regular purchase orders. Hoffman was later dropped from the Governmental pay roll at his own suggestion, having decided that it would only be necessary for him to make one or two visits weekly to the field; but he continued to represent claimant in connection with checking the accounts.

No modification of the original agreement as entered into by Simmons and claimant at the interview in Cincinnati was made except that the rate of pay for teams was increased upon claimant's representations that other contractors were receiving more and that his men were leaving him because other contractors were paying higher wages.

Gleason died in January, 1919. Hoffman was not called as a witness.

V.

During the latter part of July and August there were heavy rains which rendered portions of the field muddy where work was in progress. Either as a result of such rains or of a lack of proper policing of the stables and corral, or both, the ground therein became muddy and claimant's mules were required to stand in mud of a depth of several inches. A number of mules became diseased and disabled, and five had to be destroyed. Portions of claimant's scrapers and harness and other equipment disappeared or were damaged. In the latter part of August and in September claimant made complaint to Simmons that his teams were discriminated against by being assigned to work in muddy portions of the field and were also suffering from standing in mud and water; also that other contractors had appropriated portions of his harness and other equipment.

These complaints were investigated by Simmons personally and through Riehle and others. The complaint as to discrimination as to claimant's teams was found to be without foundation and claimant was so notified by letter dated September 18, 1919, in which Mr. Simmons also disclaimed responsibility on the part of the Government for the condition of the live stock or any other loss of equipment.

VI.

On or about September 17, 1918, claimant abandoned work at McCook Field and withdrew his animals and other equipment.

VII.

The blacksmith "outfit" or equipment, for the rental of which, etc., claim is made, was not mentioned at the conference in Cincinnati. Byrnes' mules were shod by the Government blacksmith who made use of a portion of this equipment, but the equipment was incomplete and many of the tools of poor quality and not adequate for the work required of them, so that it was necessary to supplement the equipment from Government stock. It was not proved that this equipment was included in the agreement that claimant made with Simmons and, therefore, there can be no obligation on the part of the Government to pay rental for it, nor any liability to replace or compensate claimant for the articles thereof claimed to have been lost.

VIII.

Nothing was said by Simmons at the interview in Cincinnati aforesaid agreeing or assuming on the part of the Government to insure claimant's animals or other equipment against loss or damage, or to undertake or provide for the care of the animals and equipment or to be responsible therefor in any way. Claimant rarely visited the corral or stables while his equipment was there, although he might freely have had such access at any time he desired. He was never refused access to the stables and corral nor to any part of the field where the men and teams were working. There was no requirement on the part of the Government that his animals when not working should be kept in the stable or corral constructed for them as aforesaid, and he was entirely at liberty, if conditions at said stables and corral were unsatisfactory to him, to have kept his animals and equipment elsewhere, as was, in fact, done by other contractors whose teams were working at the field.

CONCLUSION.

Claimant's testimony is to the effect that the proposition of taking his equipment to McCook Field was first made to him by Allen, who told him that he would go there "under the same conditions that I came to Moraine City." These conditions, as testified to by claimant, related mainly to rates of payment for teams, scrapers, plows, saddle horses, etc., although he testified further that Allen said that the Government would take care of his animals and return them to him in the same condition in which they were brought to McCook Field. This last contention appears to have been made for the first time in claimant's letter to Simmons of September 10, 1918, and was promptly disavowed by the latter in his reply of September 13.

Allen concededly had no authority to make any agreement for the Government and was not even called as a witness. Whatever agreement there was, therefore, depends on what took place upon the occasion of the conference at claimant's office in Cincinnati. The testimony of both Simmons and Biehle was very clear to the effect that nothing was said by Simmons at this interview in which he agreed in any way that the Government should be responsible for the care of the live stock or for the condition of the stables. These and the other buildings were to be constructed simply as a matter of convenience and the evidence shows that the rates of hiring—which, according to both parties, was the principal subject discussed—were intended to cover the feeding and care of the live stock. It is not claimed that the arrangement entered into at this interview was subsequently modified, with the single exception above found, which related only to the rate of hire for teams.

Claimant, therefore, is in the position of relying for the establishment of his claim upon statements alleged to have been made to him by a person whom he did not call as a witness and who admittedly was not a Government representative in any sense, and as far as appears had never claimed to be.

Taking the most favorable view of claimant's testimony upon this point, it simply establishes what this unauthorized person told him of the terms of an agreement which the Government would make with him but which was never confirmed as to the point in dispute by any person having any semblance of authority.

Moreover, it appears that all claimant's equipment, animals, and machine were employed at McCook Field. It does not appear that he had any other business, nor does it seem unfair to draw the inference that the major part of his capital was invested in this equipment. He is unquestionably a man of experience in his line. He personally selects and buys his mules. It is incomprehensible that under the circumstances he should have trustingly confided a large number of valuable animals, representing to him so large an investment, to the mercies of people whom he knew nothing about, without the most definite and specific of agreements as to the responsibility for their proper care. It is unbelievable that in the absence of such a definite and specific agreement he should have failed to exercise personally close supervision over them, or provide for such supervision by someone in whom he had entire confidence. In short, he impressed the Board as too intelligent and experienced a business man to have ever made such an agreement as he now seeks to establish. The only explanation compatible with all the facts proven is that he believed his interests would be thoroughly protected by Gleason, whom he knew and had employed, and whose appointment as

foreman he had secured. It is not the Government's fault if his confidence proved to be misplaced.

Our conclusion is that the evidence does not establish that any responsibility for the care or condition of the animals was assumed by the Government.

After the hearing at the office of the Board on November 21, 1919, the testimony of a number of witnesses was taken upon claimant's request at Dayton and Cincinnati, Ohio. The testimony of these witnesses was mainly to the effect that they helped with harnessing the teams and about the stables generally, although they were paid by the Government paymaster, and not by claimant. It is interesting to note in this connection that two of these witnesses (Dennis and Johnson), who swore that they were paid at all times by the Government paymaster, were among the persons whose names claimant included in his statement of account rendered on November 11, 1918, to Simmons as having been paid certain sums by him, although (as he then claimed) they should properly have been paid by the Government.

The testimony of these witnesses does not, in our opinion, taken with the other evidence, establish any agreement on the part of the Government to care for claimant's animals or other equipment or to insure their health, condition, or safe return.

We find, therefore, that claimant has not established the existence of any agreement within the purview of the act of March 2, 1919, under which this Board can recommend any relief.

DECISION.

This Board will enter a final order in the usual form, denying the relief sought.

Col. Delafield, Lieut. Col. Williams, and Mr. Wise concurring.

Case No. 2271.

In re **CLAIM OF GLOBE AUTOMATIC SPRINKLER CO.**

1. **OVERTIME.**—Where claimant employed labor overtime, in performing a formal Government contract, such overtime being authorized by the contract, and the contract provides for extra pay in case of overtime, and it appears that the necessity for employing overtime labor was not due to any neglect on the part of the contractor, claimant will be entitled to be reimbursed for the amount so expended.
2. **CLAIM AND DECISION.**—Claim is made for \$2,969.74, for overtime employed in performing a formal contract, claim coming to this Board by appeal from the Claims Board of the Construction Division. Held, claimant is entitled to recover.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board of the Construction Division of the Army disallowing the claim of the Globe Automatic Sprinkler Co., of 2019 Washington Avenue, Philadelphia, Pa., for \$5,937.47 alleged to be due to it upon the performance of two contracts for the installation of sprinkler systems in warehouses Nos. 1 to 8 at the Columbus Interior Storage Depot at Columbus, Ohio. On account of an error in the computation of the amount of the claim, under its own theory of the case, the claimant amended the petition upon the hearing to reduce the amount claimed to \$2,969.74, of which \$2,376.79 is the amount alleged to have been paid by the claimant to labor for overtime and \$593.93 is 25 per cent of such labor charge to cover overhead, in accordance with the provisions of the contract which read: "Such special extra labor and extra material items therein listed as cost items plus 25 per cent to cover overhead and profit," and the third paragraph of Construction Division Bulletin No. 62 which says: "When overtime work is required it must be authorized by the constructing quartermaster and records of all such overtime kept."

2. The normal charge to be paid labor under this contract was \$5 a day. The claimant found it impossible to get labor at that rate and was compelled to pay \$6.25 a day, for which the labor was willing to work nine hours.

3. Maj. T. Frank Quilty, Engineer Corps, United States Army, the constructing quartermaster at the work, refused to approve the item of overtime and his position was sustained by the Claims Board of the Construction Division. Maj. Quilty testified that his refusal was due to his belief that overtime would not have been necessary had claimant used due diligence in arranging for its supply of component parts, the delivery of which was delayed far beyond the time he thought sufficient for their procurement. He did testify that if the claimant actually used its best efforts to obtain an early delivery of component parts, then, after the delivery of material upon the work, the need for its immediate installation and operation was so urgent, he would have felt justified in authorizing overtime to bring about an early completion of the work.

DECISION.

1. The record in this case is somewhat confused because the claimant failed to recognize the proper theory upon which to present its claim. It proceeded upon a theory that the true description of the situation encountered was that labor demanded \$6.25 per day, and was willing to work nine hours therefor, whereas \$5 for an eight-hour day was the standard for such work. Upon this theory Mr. W. F. Ritz, its assistant general manager, incorrectly answered hypothetical questions put to him. Upon his cross-examination, it developed that the claim was properly grounded upon an actual need for overtime work independent of the daily rate demanded by labor and that the laborers worked nine hours a day by reason of the actual needs of the work rather than because the claimant made a nine-hour day a condition of paying \$6.25. It was shown that a laborer who worked four hours during one day was paid \$2.50, whereas a laborer who worked the last four hours of the day *plus an additional hour* was paid \$3.75.

2. It is the opinion of this Board that Maj. Quilty's refusal to approve the use of labor in excess of eight hours was not in fact an arbitrary refusal. His approval, however, was improperly withheld because of a lack of information as to the actual difficulties encountered by the claimant in effecting a prompt delivery of component parts. The deferred class of priority certificate granted to the claimant by the War Industries Board and other causes combined to make the delay of the claimant in procuring component parts excusable.

3. An excusable delay having retarded the performance of the work, the urgent need for the sprinkler protection made it necessary to use labor overtime. Upon this basis, the Government's only witness, Maj. Quilty, testified that he would have regarded the use of overtime entirely justifiable and entitled to his approval.

4. The Board is of the opinion that Maj. Quilty's approval should have been given and the claimant is entitled to recover the actual amount paid for overtime plus 25 per cent thereon, in accordance with the terms of the contract.

5. Nothing in the record contradicts the tabulated and extended statements of the claimant and it therefore appears the claimant is entitled to be paid \$2,969.74. An examination of the claimant's overtime record will be made and the amount found herein is subject to reduction in the event that the amount paid for overtime was less than \$2,375.79.

DISPOSITION.

1. This Board will make a settlement contract in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Smith concurring.

Case No. 1572.

In re CLAIM OF MOTOR PRODUCTS CORPORATION.

1. **TEMPORARY AND PERMANENT BUILDING CONSTRUCTION.**—Where claimant was instructed by the Government to procure immediate construction at Government expense of an inexpensive temporary building for assembling monoplanes, and owing to difficulty and delay involved in procuring materials for such a building claimant procured the construction of a permanent building, there was an agreement within the meaning of the terms of the act of March 2, 1919, under which claimant is entitled to reimbursement to the extent of the cost of such a temporary building at the time the instructions were given, less its present salvage value.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral agreement to the effect that the Government would pay the cost of construction of a temporary building for assembling monoplanes. Held, claimant is entitled to relief.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$24,620 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In June, 1918, the Bureau of Aircraft Production had under consideration the construction of a new type of monoplane designed by a Mr. Stout and known as the Stout monoplane. No plane like the Stout monoplane had been flown successfully, although experiments with a similar plane had been made in England. The design called for the engines and the pilot's seat to be placed between the upper and lower surfaces of the wing. There was no fuselage, but there was a slight enlargement of the plane at the center to accommodate the engine and the pilot. Mr. Stout's theory was to make the whole airplane conform as nearly as possible to one big wing. One advantage of this kind of plane was the unusual speed that would be developed.

3. Lieut. Col. J. G. Vincent was the chief of the Engineering Division of the Bureau of Aircraft Production and Mr. W. C. Potter

was at that time in full charge of the bureau, and at a conference they decided to experiment with the Stout monoplane. The usual practice for placing orders for experimental machines was to give an order for three machines. Maj. H. E. Blood was directed by Col. Vincent to go to the claimant's plant in Detroit and make the necessary arrangements for the manufacture and assembly of three Stout monoplanes.

4. Maj. Blood went at once to Detroit and conferred with the claimant's officers and made a verbal agreement with the claimant for the construction of three Stout monoplanes, in accordance with his instructions. This was on or about June 11, 1918. At that time the claimant was engaged in its regular business, which was the manufacture of parts for automobiles. It had never previously made any airplanes and it had no building that was suitable or could have been used for the assembly of airplanes. This deficiency was called to the attention of Maj. Blood, and he told the claimant that it should put up a cheap and temporary building suitable for the assembly of three monoplanes, and the United States would pay for it. He told Mr. Rands, the claimant's president, that the job was an experimental one and that the construction was of an emergency character and that it should be done as cheaply as possible. There were no other restrictions imposed on the claimant in respect to the character of the building that it was to erect.

5. Immediately after this conversation the claimant attempted to arrange for the construction of a cheap temporary building, using the most inexpensive kind of construction that was possible. It was found that there were neither materials nor labor to be had for the prompt construction of such a building. The claimant found, however, that it could secure at once the materials for the construction of an assembly building, which would be of a better character than the one contemplated by Maj. Blood and more expensive. The more costly building was the only kind that could be erected immediately and in time to meet the requirements for the assembly of the monoplanes. Accordingly the claimant within a day or two after receiving the order from Maj. Blood made a contract for a building, whose dimensions were about 100 feet by 100, the cost of which amounted to \$70,114.91.

6. Maj. Blood reported what he had done to Col. Vincent, and his orders were approved, but it was decided to enter into a written contract with the claimant for but one monoplane at that time. Accordingly a written contract was drawn and executed and dated June 26, 1918, No. 60-A. This contract provided for the manufacture by the claimant of one monoplane on a cost-plus basis and made no mention of the erection of the assembly building by the claimant. The award of a contract for one monoplane was not intended to be

a restriction on carrying through the experiments with the Stout monoplane but was intended only as one step in the plan. Maj. Blood's order for the construction of an assembly building large enough to hold three monoplanes was never recalled or modified. The size of the building actually constructed was the size required for an assembly building for three monoplanes and was not too large for that purpose. An assembly building for airplanes must necessarily be built without any uprights between the walls and for that reason the construction of any building suitable for assembling planes is expensive. Both Maj. Blood and Col. Vincent examined the assembly building after it was completed and both testified it was a building suitable for the purpose of an assembly building and of the proper size to contain three planes but that the kind of construction used was of a more expensive kind than that which was contemplated at the time the order for the building was given.

7. The claimant asks to be reimbursed for what an inexpensive building of the kind contemplated by Maj. Blood at the time his order was given would have cost, in June, 1918, less the salvage value of such a building if it had been built.

DECISION.

1. An oral agreement was entered into between the United States and the claimant on or about June 11, 1918, by the terms of which the United States agreed to reimburse the claimant the cost of an inexpensive building suitable for the assembly of three monoplanes. The claimant performed the agreement but constructed, by reason of the necessity for having the building completed immediately, one that cost it considerably more than the contemplated one would have cost. The claimant is entitled to be paid what a temporary building of inexpensive construction suitable for the assembly of three monoplanes would have cost in June, less salvage. What such a cost would have been should be determined by the proper officers and experts in the Construction Division of the United States Army who will also determine what the salvage value of such building would be at the time settlement is made.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage & Traffic Division.

Col. Delafield and Mr. Hamilton concurring.

Case No. 1678.

In re CLAIM OF ISCO CHEMICAL CO.

1. **RELEASE.**—Where the parties to a contract signed a supplemental agreement in which the contractor released “the United States from any and all claims which it may have by reason of the termination of the said contract,” the contractor is not entitled to an award on a claim against the Government arising out of the original contract.
2. **CLAIM AND DECISION.**—This claim was originally made under the act of March 2, 1919, but is treated as though presented under G. O. 103, War Department, 1918. It is for reimbursement of loss sustained on a proxy-signed contract for manufacture of sulphur monochloride. Claimant executed a release. Held, no relief can be awarded.

Mr. Huidekoper writing the opinion of the board.

FINDINGS OF FACT.

The board finds the following to be the facts:

1. This claim is presented by petition and is treated as though presented in accordance with G. O. No. 103, War Department, 1918, and is for \$7,706.16, under the following circumstances:

2. On June 10, 1918, the claimant, Isco Chemical Co. (Inc.), entered into proxy-signed contract G. P. R. No. 2070, with the War Department, to furnish approximately 900 tons of sulphur monochloride for war purposes. After the signing of the armistice it appears that no deliveries of the materials to be furnished had been made, and the contract was terminated in accordance with a supplemental agreement dated January 27, 1919.

3. The supplemental agreement was properly executed by the vice president of the claimant company and by Col. William H. Walker, Chemical Warfare Service, U. S. Army, and Capt. Robert W. Gordon, Chemical Warfare Service, U. S. Army. It was approved on March 24, 1919, by the Board of Review of the Chemical Warfare Service, and on June 16, 1919, by the War Department Claims Board. The following provision is contained in article 3 of said supplemental contract:

“The United States shall pay to the contractor the net amount of ten thousand one hundred thirty-eight dollars and sixty-four cents (\$10138.64). This amount is computed in the manner described in detail in schedule 1 hereto attached and made a part hereof. The said above payment is made in full settlement of all damages suffered or incurred by the contractor by reason of the termination of said contract and in full settlement of all charges or claims of said contractor against the United States arising out of either said con-

tract G. P. R. No. 2070 or this first supplement agreement thereto. The contractor hereby releases the United States from any and all claims which it may have by reason of the termination of said contract, and the United States shall not be under obligation to make any further payment to the contractor other than the sum specified in this article."

4. It further appears that in response to a letter dated November 21, 1918, from the commandant of the Edgewood Arsenal, requesting certain data relative to contract G. P. R. No. 2070, the claimant replied by letter dated December 10, 1918, stating that it hoped the data would enable the Government to pay promptly the funds due, which claimant needed. Under paragraph 6 of claimant's letter of December 10 it made claim for additional compensation, viz: Interest, \$146.16, and compensation for actual loss sustained due to cancellation of contract, \$7,560. These are the identical items for which claim is now made before this Board.

5. On April 10, 1919, the claimant wrote to Capt. Robert D. Gordon, of the Edgewood Arsenal, acknowledging receipt of six copies of the supplemental agreement No. 1 to G. P. R. contract No. 2070, and stated that it was in complete agreement with the provisions of the supplemental agreement so far as it related to the paragraphs in claimant's letter of December 10, excepting paragraph 6, and the claimant, therefore, requested reconsideration of the action in regard to the two provisions of paragraph 6 of their letter of December 10.

On April 15 Col. William H. Walker, C. W. S., U. S. Army, commandant of the Edgewood Arsenal, replied to claimant, explaining why the interest charged could not be allowed, and stating:

"The only method by which you could receive reimbursement for the interest charges noted is to make a claim under Supply Circular No. 17, which provides for those claims against the Government for which a definite contract did not exist at the time the armistice was signed. The machinery for making such a claim is exceedingly complicated and while I do not believe it is worth your while to attempt the same I assure you that this Board is willing to transmit such a claim to the Board of Review in Washington, which alone has power to review the same. * * *

On April 17 claimant wrote Col. Walker arguing in favor of allowance of the items contained in its letter of December 10, and stating:

"We would ask that you advise us specifically whether the proposed settlement No. 1 can be accepted by us to facilitate payment under its terms without invalidating the additional claim which we have above discussed."

On April 21, 1919, Col. Walker replied:

"It is not possible for us to accept a partial settlement of this claim. If, therefore, you finally decide that you will not accept payment as per our original offer, the claim must go to Washington as unsettled.

"All that is necessary on your part to accomplish this is to definitely refuse our offer of settlement. We will then forward the record to Washington as a case in which we have failed to reach a settlement with the contractor, and at some future date your case will be called by the Washington Board. This Board is very much congested at this time and I am unable even to predict when your case may be reached by it."

DECISION.

1. The petition in this case sets forth the same items of claim which are contained in paragraph 6 of claimant's letter of December 10, 1918, wherein it gave to the commandant of the Edgewood Arsenal the necessary data to enable the Government to settle its contract G. P. R. No. 2070. Upon full consideration of the data submitted by claimant in its letter of December 10, a supplemental agreement No. 1 was drawn under date of January 27, 1919, and subsequently signed by the claimant and the representatives of the Government. This supplemental agreement fully terminates and settles all charges or claims against the United States arising out of contract G. P. R. No. 2070, or the said first supplemental agreement, and releases the United States from any and all claims which it may have by reason of the termination of said contract upon payment of \$10,138.64.

2. The claimant repeatedly insisted that the items of claim now presented to this Board should be included in the settlement agreement, but they were fully considered by the representatives of the Government and disallowed. No fraud or duress is shown.

3. It has been held in case No. 2208 of the Signal Knitting Mills, decided by this Board on December 3, 1919, that a release of any and all debts and liabilities, claims and causes of action, released unenforceable as well as enforceable claims, and that the act of March 2, 1919, does not revive a previous equitable claim which has ceased to exist because of an agreement of mutual release.

It has also been held by this Board in case No. 160, decided November 21, 1919, in the claim of A. P. Baker & Co., that "the cancellation agreement released the Government from all claims, and the subsequent passage of the act of March 2, 1919, would not revive claims that have been released by valid agreement and the claimant would not be entitled to recover."

4. Because the claimant has received from the Government the sum of \$10,138.64 "in full settlement of all damages suffered or incurred" by it by reason of the termination of its contract G. P. R. No. 2070, "and in full settlement of all charges or claims" against the United States arising out of said contract and has released "the United States from any and all claims which it may have by reason of the termination of the said contract," the Board is of the opinion that the relief prayed for should be denied, and it is so adjudged.

Col. Delafield and Mr. Bryant concurring.

Case No. 1773.

In re **CLAIM OF WALTER M. STEPPACHER & CO. (INC.).**

1. **PROMISE OF CONTRACT.**—Where a contractor is definitely promised an order for the manufacture of goods and is requested to hold its workmen together in order to execute the order, there is an agreement within the purview of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, based upon an oral promise of a contract for the manufacture of olive drab flannel shirts. Held, claimant is entitled to relief.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Director of Purchase, disallowing a claim for \$1,336.10 on an informal contract. Statement of claim was filed on Form A. The circumstances are as follows:

2. On October 16, 1918, Clarence L. Marks, vice president of the claimant, called upon George P. Wakefield, assistant chief of the light goods section of the Quartermaster General's Department, and informed him that the contract for olive drab flannel shirts under which the claimant was manufacturing for the Government would be finished in a few days. Mr. Marks inquired whether claimant would be expected to fill further orders for the Government, or could take up civilian work. Mr. Wakefield replied that he was greatly pleased with the manner in which the claimant's work had been done, and wished to place with it a further order for 12,000 shirts. Mr. Wakefield further stated that he wanted the claimant to retain that part of its organization consisting of the cutters, and that he would see that the contract was forthcoming without delay. Mr. Marks agreed that this should be done.

3. Shortly after October 30, 1918, the claimant received an order for 12,000 olive drab flannel shirts at 53 cents each. The order, which was intended for the claimant, was erroneously made out in the name of W. Maurice Steppacher as contractor, and was returned for correction. The corrected order was not received, and claimant was advised on November 20 that the Government would not want fulfillment of the order.

4. On the hearing it appeared from the claimant's evidence that all of the expenditures mentioned in the claim, except the wages of certain cutters, had been made in the expectation of further Government work, but before the request of Mr. Wakefield that the claimant hold its organization together in preparation for the proposed contract.

5. Acting upon the request of Mr. Wakefield that the claimant keep its organization together, it paid to these cutters four weeks' wages, amounting to \$312, covering the period from October 23 to November 20, during which time, having no work of the character for which they were being retained, the claimant set them at odd jobs. The service they rendered while waiting for the Government work was worth to claimant half the amount paid them.

6. On the hearing claimant abandoned all claim for other items.

DECISION.

1. The request of the representative of the Quartermaster General's Department that the claimant hold its force of cutters together until it should receive the further contract from the Government, and his promise to see that a contract should be forthcoming, which request the latter agreed to, enter into the proposed contract with the claimant, to repay it such expense as it incurred in holding its force together in anticipation of the promised contract.

2. The amount of the wages paid the claimant's cutters for the period of four weeks before it was notified that the contract would not be awarded, less the value of the work of the cutters to the claimant during that period amounting to 50 per cent of their wages, should be awarded to the claimant, and it is entitled to receive the sum of \$156, the amount of such difference.

DISPOSITION.

This Board will make a statutory award in accordance with this decision and transmit the same to the Claims Board, Director of Purchase, for appropriate action and payment.

Col. Delafield and Mr. Hamilton concurring.

Case No. 561.

In re CLAIM OF FREIBERG LUMBER CO.

1. **EXTRA MATERIAL.**—Where claimant had a formal contract with the Air Service for the sawing of propeller lumber and, during the performance of such contract the Government required the contractor to saw the logs so that the parts of the log left would be suitable to make gun stock flitches, and the Government agreed to find the contractor a buyer for the gun stock flitch lumber at \$80 per thousand, and the change required the contractor to use many more logs in performing its formal contract, and the Government failed to procure a purchaser, as it had agreed, there is an implied agreement on the part of the Government to reimburse the contractor the extra expense incurred in complying with the Government's request.
2. **WAIVER OF DELAY IN DELIVERY.**—Where the contractor was behind in its deliveries, but the Government continued to accept deliveries, the Government can not, long afterward, cancel the contract because of such delays in delivery; the Government being deemed to have waived any advantage it might have taken because of late deliveries.
3. **CLAIM AND DECISION.**—Claim is filed for \$4,716.95 under the act of March 2, 1919, for extra lumber used in sawing logs in a different manner, at the special request of the Government, than would be otherwise required in performing a formal contract for producing propeller lumber. Held, claimant is entitled to recover.

Lieut. Col. Junkin writing the opinion for the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$4,716.95 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. Although filed as a class B claim, the several claims of the petitioner are based upon (a) a formal valid contract and (b) an alleged implied agreement arising as hereinafter set forth.

3. The items of the claim as set up in the petition are as follows:

4,500 feet of walnut, cut into propeller lumber, at \$310 per thousand feet	\$1,395.00
Which claimant proposes to salvage at \$90 per thousand feet	405.00
Leaving a balance due on this item	\$990.00
14,894 feet of unsawed walnut logs, left on claimant's hands from which propeller lumber and gunstock flitches were to be cut, at \$150 per thousand feet	2,234.10
Which claimant proposes to salvage at \$50 per thousand feet	744.70
Leaving a balance due on this item of	1,489.40

44,751 feet of walnut, cut into gunstock flitches, at \$80 per thousand feet-----	\$3,580.08
Which claimant proposes to salvage at \$30 per thousand feet-----	1,342.53

Leaving a balance due contractor on this item----- \$2,237.55

Total----- 4,716.95

4. On June 10, 1918 an order, No. 400, of the Bureau of Aircraft Production, War Department, was given claimant covering 50,000 feet of walnut lumber cut for airplane propellers, at \$310 per thousand feet, or a total amount of \$15,500. This order was signed by F. D. Schnacke, First Lieutenant, Air Service, Signal Reserve Corps. On June 13, 1918 a formal contract was executed between the claimant and said Lieut. F. D. Schnacke confirming the foregoing order. On July 10, 1918 a supplemental contract was signed by the same parties covering matters of inspection and shipment under the original contract. On February 6, 1919 Lieut F. D. Schnacke (then Captain), Air Service, Aircraft Production, wrote claimant referring to order No. 400, informing it that in view of the fact that 27,033 feet of airplane-propeller lumber had been received and accepted by the Government, the above order was thereby amended, cancelling the remaining lumber called for by the order and contract and decreasing the order accordingly, so that the amount of propeller lumber called for by the contract was reduced from 50,000 feet to 27,033 feet and the amount to be paid therefor was reduced from \$15,500 to \$8,380.23. Twenty-seven thousand and thirty-three feet of propeller lumber were delivered to and accepted by the Government and \$8,380.23 was paid the claimant by the Government.

5. On November 26, 1918, about 15 days after the armistice was signed, the above contract was suspended by the Government by telegraphic notice, which recited that such suspension was owing to the failure of the claimant to perform the stipulations of the contract within the time and in the manner specified therein. The conclusion from the evidence is unavoidable, however, that the real cause for the suspension was the signing of the armistice. The actions of the Government in accepting deliveries and in seeking further deliveries under the contract and in aiding the claimant to obtain walnut logs for manufacture into airplane lumber and gun flitches, as shown by its correspondence with the claimant and by the subsequent amendment of the contract by letter on February 6, 1919, clearly indicate a waiver by the Government of default, if any, in prompt deliveries by the claimant.

6. While the claimant was proceeding under its contract to manufacture propeller lumber, the Bureau of Aircraft Production on August 7, 1918 wrote the claimant as follows:

"1. It is imperative that such mills as are cutting propeller walnut for the Bureau of Aircraft Production should make available for sale to mills who have gunstock contracts from the Ordnance Department, that part of the log which does not produce desirable propeller walnut. These gunstock flitches should be $2\frac{1}{2}$ inches in thickness and of a grade that will produce an average of one clear gunstock for every 10 feet board measure, of flitch. *This grade of flitches can not be produced where propeller material is taken from all four faces of the log.* Therefore, this section asks its contractors to manufacture their logs by taking propeller material from the two opposite faces of the log only and then converting the balance of the log into $2\frac{1}{2}$ -inch flitches, and it is better not to undertake to cut propeller lumber from 12 and 13 inch longs. They are too small for the purpose and it merely *ruins gunstock flitches* to undertake it.

"2. If, by cooperating as outlined above, you will produce these flitches, that will cut gunstocks on the 10-inch basis, the Ordnance Department, Production Division, will find a ready sale for same at a price of \$80 per thousand square feet, board measure, f. o. b. near-by gunstock mill."

This letter was signed as follows:

"By direction of the Director of Aircraft Production.

"MATERIAL DEPARTMENT, FOREIGN AND UNITED STATES,

"By J. C. WYCKLIFFE,

"Hardwood Section."

J. C. Wickliffe was the assistant chief of the Hardwood Section of the Aircraft Production Bureau, and many, if not all, of the other letters of that bureau to the claimant were signed as in the above quotation.

7. Prior to the receipt of this letter, the claimant had been repeatedly impressed, by letters from the Ordnance Department and Aircraft Bureau, some of which were signed by both the Ordnance officials and Aircraft officials, with the fact that walnut was a "controlled wood"; that it was "urgently needed at this time by the United States Government for the manufacture of gunstocks and airplane propellers"; that unless the Government received the unqualified cooperation of manufacturers in the conversion of suitable walnut logs into nothing but propeller lumber and gunstock flitches, the Government might be compelled to discontinue the contractors' "walnut operations"; that this lumber "is a vital necessity for the manufacture of gunstocks and airplane propellers for the immediate equipment of our forces"; that "the Ordnance Department, Procurement Division, will give you addresses of parties to whom you can sell the $2\frac{1}{2}$ -inch planks when you have some ready." The Ordnance Department had previously, by letter of May 13, 1918, advised the claimant that the specifications of the Ordnance Department for gunstock flitches called for "planks 8 inches and up wide, $2\frac{1}{2}$ inches thick, and 10 to 16 feet long."

8. The contractor first made efforts to obtain a formal contract with the Government for the manufacture of the gunstock flitches, and also for the manufacture of these flitches into gunstocks, but was advised by the Ordnance Department that the Government purchased its gunstocks exclusively from certain already selected manufacturers, whose names and addresses were given the claimant, with the information that it would find with them a ready sale of his gunstock flitches.

9. The contractor, in accordance with the letter of August 7, 1918, and under its contract for propeller lumber, laid in a sufficient stock of walnut logs suitable for the manufacture of both propeller lumber and gun-flitch lumber, and manufactured the same as required by the Government in said letter of August 7. In order to manufacture in the manner there directed, it was necessary for the claimant to purchase logs larger than 12 to 13 inches in diameter, and therefore more expensive, and to lay in from two to three times more logs in order to fulfill its contract for propeller lumber than it would have had to purchase had it been permitted to saw propeller lumber from all four sides of the log. In view of the fact that it was imperative to "make available for sale to mills who have gunstock contracts from the Ordnance Department" gunstock flitches, the claimant cooperated with the Government as requested, and produced a large supply of flitches, which it endeavored to sell to those contractors to whom both departments had directed it and at the price promised. But as shown by the contractor's affidavit of October 17, 1919, he succeeded in disposing of only one carload of the gunstock lumber; that was at the promised price of \$80 per thousand feet and was made to one of the companies to which the contractor had been directed by the Government and with which it had been promised by the Bureau of Aircraft Production it would find a ready sale at \$80 per thousand square feet.

DECISION.

1. The formal contract of the claimant for the manufacture of propeller lumber was not suspended by the Government because of any default on the part of the claimant, but was suspended by reason of the armistice, in order to save the Government further and unnecessary expense thereunder, and it was the intention of the Government to settle with claimant by supplemental agreement on a fair and equitable basis. By reason of such suspension and by reason of the Government, through its duly authorized officers or agents, requiring the sawing of the walnut logs in a manner other than that called for by the contract and in a manner requiring the purchase of a greater quantity and a more expensive quality of

walnut logs for the fulfilling of the formal contract than would have been necessary if the contractor had not been required to produce gunstock flitches, the claimant has sustained damages for which it is entitled to reimbursement by the Government as follows:

(a) The actual cost to claimant of such walnut logs as it necessarily acquired for the purpose of fulfilling its contract for propeller lumber, taking into consideration the greater quantity of logs it was necessary for claimant to acquire for such purpose by reason of cutting the same as directed in the letter of August 7, 1918, for the manufacture under its formal contract of propeller lumber prior to the receipt of notice by the claimant that said contract was suspended, less the salvage value thereof; (b) for such propeller lumber as it had manufactured and had on hand at the date of such suspension at the price called for by said formal contract, less the salvage value thereof.

2. Where a contractor holding a formal contract with the United States for the manufacture of walnut airplane lumber is instructed by an officer or agent of the Secretary of War authorized to direct in the interests of the Government the manner in which walnut logs shall be cut so as to adopt a method of cutting more expensive to the contractor than the one it had been using when it entered into the contract or than the method which it could have used with greater saving to itself, there is an implied agreement created that the Government will reimburse the contractor the loss caused by the limitation thus made upon the manner in which he may cut the logs; or if any officer or agent having authority to promote production under the Secretary of War induces such contractor to change to his disadvantage the method of cutting logs by promise that the claimant will thereby be able to obtain from another department of the Government, or from independent contractors, a sale for the portion of the lumber thereby saved for uses other than airplane lumber, and it is found not to be possible for the contractor to make such sale and it thereby suffers loss, there is an implied agreement that the Government will reimburse it the loss caused. From the application of these principles to the findings of fact, it follows that there is an implied agreement within the act of March 2, 1919, known as the Dent Act, between the claimant and the United States under which the claimant is entitled to reimbursement by the United States for such walnut lumber left on hand as the claimant cut into gunstock flitches up to November 26, 1918, the date of the suspension of the formal contract, in pursuance of the order and promise of August 7, 1918, at \$80 per thousand square feet, board measure, less the salvage value thereof.

DISPOSITION.

This Board will transmit its decision to the Claims Board, Air Service, for proper action as to the claim for loss on walnut airplane lumber and walnut logs and will make and transmit a statement of the nature, terms, and conditions of the implied agreement respecting gun flitches and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, as to the losses on gunstock flitches.

Col. Delafield, Mr. Bryant, and Mr. Shirk concurring.

Case No. 1906.

In re CLAIM OF THE OHIO RUBBER CO.

1. **INITIAL—UNABSORBED OVERHEAD EXPENSES.**—Where claimant had a contract to supply 400,000 yards of shock-absorber cord for \$199,360 and such contract was suspended by the Government before completion, and where claimant was a selling and engineering concern and incurred practically all of its expenses before the termination of the contract, claimant is entitled, in addition to its commitments, reimbursement of its expenditures up to but not exceeding the net amount it would have received if the contract had been completed.
2. **CLAIM AND DECISION.**—This is an appeal from the Air Service Claims Board and is presented under G. O. 103 upon the theory that claimant is entitled to reimbursement of commitments and of selling expenses which accrued prior to the suspension of the contract. Held, that claimant is entitled to reimbursement of its expenditures up to but not exceeding the net amount it would have received if the contract had been completed; that in addition to \$4,444.40 for commitments claimant is entitled to \$10,908.78, being 9.090909 per cent of \$119,988.80, representing uncompleted portion of the contract.

Mr. Montgomery writing the opinion for the Board:

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim comes on appeal from the Claims Board, Air Service. It arises out of the suspension of a formal contract dated September 14, 1918, between the United States, represented by Capt. O. R. Ewing, A. S. A. P., and the claimant, contract No. 4670, for the manufacture of certain shock-absorber cord specified in order No. 720506. The amount of the claim is as follows:

For settlement of commitments to subcontractors.....	\$4,447.40
Selling expenses incurred by contractor, being 11.06 per cent of \$119,988.80, the uncompleted portion of contract.....	13,270.86
	<hr/> 17,718.16

The Air Service Claims Board allowed the \$4,447.40, but disallowed the \$13,270.76.

This claim was heard with another claim of the Ohio Rubber Co., No. 150-C-1917. The two are similar in fact and are governed by the same principles.

2. Claimant is a selling organization, acting as sales agent for various large companies with which it has affiliations. It is not engaged in the manufacture of any material or merchandise. In connection with making sales, it performs development and engineering services.

3. Claimant is the exclusive selling agent of the J. W. Wood Elastic Web Co., Stoughton, Mass., which has no selling organization and no selling expense whatsoever, but is solely a manufacturer.

4. The contract price at which the claimant agreed to manufacture order No. 720506 was \$200,000. This was amended by letter of October 3, 1918, from Capt. Schnacke to the claimant, to \$199,360. It made a contract with J. W. Wood Elastic Web Co. to do the actual manufacturing at \$181,236.37, and had the contract been completed, the claimant's compensation, including both its expense and any profit, would have been 10 per cent of this amount, or \$18,123.63.

5. On December 4, 1918, the claimant's contract was suspended by the Government, and it appears that there was an uncompleted portion for which, when completed, there would have been due the claimant \$119,988.80. The claim filed is for 11.06 per cent of this amount, or \$13,270.76. This is upon the theory that claimant is entitled to be allowed such proportion of its annual expenses as the amount of this contract bears to the aggregate amount of all its contracts made during the year. At the time the claim was filed the claimant's expenses for the year ending December 31, 1918, had not been determined and could not then be determined. The claim was accordingly based upon claimant's average yearly expenses for the preceding three years.

6. Claimant's expenses for the year ending December 31, 1918, have since been determined. They were, as appears from the testimony, 9.886 per cent of its total business, and it accordingly now seeks an allowance of 9.886 instead of 11.06 per cent on \$119,988.80.

7. Practically all of claimant's expenses in negotiating and procuring any contract are incurred before the signing thereof. In connection with this and other contracts which the claimant had with the Government for shock-absorber cord, it rendered extensive services in devising and specifying the kind of cord which would meet the Government's requirements.

8. Early in 1918 claimant obtained its first order from the Government for shock-absorber cord. This proved to be not what was wanted. At the request of the Government, claimant's sales manager went to Washington and to other places, collaborated with Government experts and worked out the specifications required. The claimant's entire organization, so far as they could assist in the matter, engaged in the work of designing and specifying the article finally adopted. The expenditures made by the claimant in this connection are included in its expenditures for the year, and the year's expenses are referred to by its auditor as "overhead expenses."

9. The cord as specified in claimant's first contract with the Government pulled about 40 pounds when drawn out 100 per cent

of its normal length. That was not stiff enough. Claimant was asked to bring it up to the highest possible point, and brought it up to a resistance of 190 pounds when drawn out 100 per cent of its normal length.

10. The claimant is said to have received orders for about 65 per cent of the shock-absorber cord purchased by the Government, and was given large freedom in the determination of the quality and character of the cord.

DECISION.

1. The claimant is entitled to reimbursement for its expenditures, obligations, or liabilities necessarily incurred in performing or preparing to perform the contract in question.

2. The evidence indicates that the expenses of the claimant are not apportioned to particular contracts, but are treated, in toto, as overhead. Its sales manager and auditor testify that the total expenses of the company for the year 1918 were 9.886 per cent of the aggregate amount of all its sales for that year. They claim that, accordingly, the expense of the company incurred in connection with this particular contract is 9.886 per cent of the contract price, and that hence claimant should be allowed 9.886 per cent of the price of the uncompleted portion of the contract.

3. According to claimant's theory, had the contract been completed, its profit, if any, would have been included in the \$18,123.63, the difference between the contract price and the price it would have paid the subcontractor.

4. Claimant's percentage of overhead, however, being figured on the contract price of \$199,360, is greater than the difference between the price it was to receive and the price it was to pay its subcontractor. This difference, \$18,123.63 is 9.090909 per cent of the Government contract price. If the overhead is 9.886 of the Government contract price, there would have been a loss on the contract.

5. Inasmuch as the expenditures of the claimant in connection with the contract were made before it was terminated, it is entitled to reimbursement for its expenditures up to, but not exceeding, the net amount it would have received if the contract had been completed. It should therefore be allowed the amount already fixed by the Air Service Claims Board for its expenditure in settlement of commitments, \$4,447.40 and an additional sum of \$10,908.07, being 9.090909 per cent of the \$119,998.80, representing the uncompleted portion of the contract.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for appropriate action.

Col. Delafield and Mr. Hamilton concurring.

Case No. 2319.

In re **CLAIM OF CANADA WIRE & CABLE CO. (LTD.).**

1. **TERMINATION CLAUSE—CONSTRUCTION OF—PASSING OF TITLE TO RAW MATERIALS AND ARTICLES IN PROCESS.**—Where a contract provides that on termination by the Government, the Government shall pay for raw materials and articles in process of manufacture, which the contractor has on hand for the contract at the time of termination, and that "any raw materials, articles in process of manufacture, and other property so paid for, shall become the property of the United States," and notice of termination is given, such notice has the effect of a notice to the contractor that the Government will pay for and take title to the raw material and partly finished product, and operates as a contract of sale under which title to the property vests in the Government.
2. **SAME—DESTRUCTION BY FIRE.**—Where under the above situation, a fire occurs without the fault or negligence of the contractor and destroys partly finished products and raw material purchased for the performance of the contract, the loss falls on the United States and claimant is entitled to be reimbursed the cost of the property destroyed.
3. **CLAIM AND DECISION.**—This claim arises under General Order 103 on the suspension of two duly executed contracts to insulate and braid outpost wire, the raw material ordered for the sole purpose of these contracts and the partly finished product thereunder being destroyed by fire before delivery. Held, that the title to the raw material and the partially finished product passed to the Government on the suspension of the contract, and that claimant is entitled to the relief sought.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$83,147.46, under the following circumstances:
2. The Canadian Wire & Cable Co. (Ltd.), of Toronto, Canada, entered into two contracts with the United States Government for the insulation and braiding of outpost wire.
3. Contract No. S. C. 403, order No. 180366, dated October 8, 1918, between the United States Government and the Canada Wire & Cable Co. (Ltd.), provided for the making of 1,500 miles of outpost wire, twisted pair, insulating and braiding only.
4. Contract No. S. E. 436, order No. 180382, October 23, 1918, provided for 1,000 miles of wire, outpost, twisted pair, insulating and braiding only, per Signal Corps Specifications, etc.

5. The United States Government in both contracts was to furnish the strand wire upon which the insulation was to be installed, and up to the date of the suspension of the two contracts, 930 miles of bare wire on 118 reels had been so furnished.

6. The contractor on January 3, 1919, had completed 43.294 miles of wire.

7. On January 3, 1919, claimant received the following wire:

"Suspend production on Signal Corps orders eighteen zero three eight two and eighteen zero three six six and render immediately itemized statement as a basis of termination of these orders in accordance with supply circular one eleven."

8. On January 4, 1919, the following letter was sent to claimant:

"1. The following is confirmation of telegram sent you January 3rd, 1919:

"Suspend production on Signal Corps orders eighteen zero three eight two and eighteen zero three six six and render immediately itemized statement as a basis of termination of these orders in accordance with supply circular one eleven."

"2. For your guidance in preparing itemized statement, attention is invited to Supply Circular 111, copy attached, which indicates the method to be followed.

"3. You are also requested to advise what credit you will allow on each item, material and equipment, based on your taking over same, as there is a quantity of such materials which you could undoubtedly dispose of to better advantage than the United States Government.

"4. Upon receipt of this itemized statement prepared *under oath* and in duplicate, the same will be submitted to the Board of Review, P. S. & T. Division for consideration.

"5. You are requested to acknowledge receipt of these instructions.

"By authority of the Director of Purchase.

"I. D. HOUGH,
Major, Signal Corps, in Charge Signal Branch.

By "H. C. JOOS,
First Lieut. Signal Corps."

9. Immediately upon receipt of the telegram, claimant ceased operations and withdrew all unfinished product from the machines, and stored the completed wire and the raw material in one of its warehouses.

10. During the month of January the claimant was notified that it might, if it so desired, proceed to complete the work it then had on its reels, but claimant declined to do any further work on the contract and on February 17 filed its claim with the Wire & Cable Section, Materials Branch, Office of the Director of Purchase and Storage.

11. After the suspension of the contract on January 3, the contractor requested shipping instructions with respect to the finished

and partly finished materials and also with respect to the bare wire owned by the Government which remained in the contractor's plant. No such instructions were given up to April 27, 1919, on which date there occurred without fault or negligence of the contractor a fire which partly destroyed a portion of the materials on hand, including all of the finished and partly finished wire and much of the raw material purchased and held by the contractor for the sole purpose of fulfilling the two Government contracts herein mentioned.

12. The contracts were identical in terms, except as to quantities, and provided:

"This contract may be terminated by the United States and in the event and upon such termination of this contract prior to completion. * * * The United States shall make payments to and protect the contractor as follows:

"(a) The United States shall pay to the contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination becomes effective.

"(b) The United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expenditures for plant, facilities, and equipment solely provided for the performance of this contract) made by the contractor in good faith in connection with the performance of this contract as is fairly and properly apportionable to the articles of work the delivery or performance of which is so terminated, plus 10 per cent of the amount so ascertained. *Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States.*

* * * * *

"(d) The United States shall also pay to the contractor on account of depreciation or amortization of plant, facilities, and equipment, solely provided by the contractor at its expense for the performance of this contract, an amount to be determined. * * *

The contractor asks relief as follows:

Value of finished product.....	\$3, 610. 72
Work in process.....	5, 192. 25
Raw materials.....	61, 769. 76
Machinery.....	7, 709. 55
	<hr/>
	78, 282. 28
Bonded warehouse.....	\$125. 00
Inward handling.....	750. 00
Interest on expenditures.....	1, 500. 00
Storage charges after termination.....	400. 00
Salaries and overhead.....	7, 500. 00
10 per cent on expenditures other than for plant and equip- ment.....	7, 753. 20
	<hr/>
	18, 028. 20
	<hr/>
	96, 310. 48

13. The total amount of the claim appears to be \$96,310.48. The claimant herein, however, gives the Government credit for the following materials purchased from it:

15.400 pounds rubber-----	\$7, 161. 00
9.417 pounds cotton-----	4, 498. 87
9.009 pounds reclaimed-----	1, 297. 29
1.095 pounds high grade-----	205. 86
	<hr/>
	13, 163. 02

leaving a difference of \$83,147.46, the amount of claim herein.

14. The contractor testified as to the item of machinery that credit had been given, and it was charged only with depreciation in the value of the machinery; that is, the difference between the cost of the machinery and its value at the time of the fire.

DECISION.

1. The principal question for decision herein is as to whether the contractor is entitled to any reimbursement on account of the raw material, a portion of which was destroyed by fire. Or, to put it in another way, in whom did the title to the raw material and partly-finished product vest at the time the contractor received the telegram notifying him to suspend production?

2. The contract under Section II, article 10, subdivision (b), provides as follows:

(b) “ * * * Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States.”

3. The doctrine governing such cases seems to be as follows:

“When the contract is for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred, or in other words, if the goods are specific whether the contract of sale is executed or executory depends solely on the intention of the parties, or as otherwise expressed, where neither the statute of frauds nor the rights of creditors are involved the title will pass whenever the parties intend it to; and while this intention must be manifested at the time the bargain is made, it may be shown by circumstances as well as declaration, and very slight acts are often sufficient to evince such intention. The parties may make whatever agreement they see fit as to when the title shall pass and where the language of the agreement clearly and unequivocally manifests such intention, it will control, but if as frequently happens the intention is not clearly manifested it must be ascertained by the rules of the agreement, but also the subject matter, situation of the parties, and other circumstances surrounding the transaction. The courts have laid down certain rules in regard to when title passes based upon the performance or nonperformance of certain acts, or the existence or nonexistence of certain facts and circumstances, but they are merely rules of

evidence to aid in ascertaining the intention of the parties and while a more or less conclusive presumption arises therefrom that the title was or was not intended to pass, it is not conclusive and will not control, if a contrary intention is otherwise shown. So, where the intention of the parties is not clear but must be determined from the facts and circumstances of the case, it is a question of fact for the jury." (35 Cyc., p. 277.)

4. It would seem, therefore, that the notice of termination was in fact a notice to the contractor that the Government would pay for and take title to the raw material on hand and the partly finished product. This notice had the effect of a contract of sale of this material to the Government under which title to the property vested in the Government. Such title would have been good as against every one except a purchaser for value without notice. (See Pollock, First Book of Jurisprudence.) And it can not be held that the language of the contract,

"Any raw materials * * * *so paid for* shall become the property of the United States,"

postponed the time when title should pass to the time when the Government actually made payment.

5. The words "any raw materials *so paid for* shall become the property of the United States" are merely explanatory and are not to be construed as either a condition precedent or a condition subsequent. They simply define what class of expenditures the contractor shall be reimbursed. They do not in any manner attempt to state a condition precedent to the passing of title.

6. The rules laid down for ascertaining whether a condition be precedent or subsequent are as follows:

"The nature of conditions in contracts of sale, whether conditions precedent, concurrent, dependent, or independent, depends upon the intention of the parties, and in construing such provisions technical words should give way to such intention. A stipulation may be a condition precedent in the sense that the contingency must happen prior to the existence of any contract, or be performed before there is a complete contract of sale, or transfer of title, or it may be a condition subsequent, the performance of which will defeat a title which is passed. So, also conditions of the contract may be concurrent or they may be either dependent or independent.

"Whether a condition is precedent or subsequent depends upon the intention of the parties as shown by the terms and proper construction of the contract. The condition will be construed as a condition precedent if the act stipulated for must be performed before performance can be required from the other party, or if the stipulations are mutual and go to the whole consideration of the contract, or are of the very essence of the contract, but ordinarily a condition which does not go to or constitute the entire consideration will not be held to be a condition precedent. The condition is a condition

subsequent if it was the intention of the parties that upon the happening of such condition the contract should be extinguished, or the property revert in the seller. (35 Cyc., p. 111.)

"If a condition is imposed on one of the parties to the sale as a condition precedent to the performance by the other party, there must be full and complete performance of such condition to put such other party in default, unless such performance is waived. If no time is fixed for the performance of conditions, they must be performed within a reasonable time. If conditions are concurrent or dependent neither party can maintain an action for breach by the other party without showing performance of conditions on his own part, or an offer to perform, although it is not certain from the terms which is to do the first act." (35 Cyc., p. 163, par. 3.)

"Although under the terms of the contract there is no absolute obligation on the seller to deliver, yet in order to put the buyer in default he must be in a position to perform or show a readiness so to do, and if he is able, ready, and willing to deliver it as a performance so far as the seller is concerned." (35 Cyc., p. 168, par. 4.)

"Payment may, however, be made a condition precedent by the terms of the contract. The obligation to pay will, of course, become absolute on a proper delivery, or on acceptance of the goods, or at the expiration of the period fixed for trial and approval; and in such case the buyer can not impose additional conditions as precedent to payment." (35 Cyc. p. 263.)

7. In all of the cases examined where payment was made a condition precedent, said condition was imposed for the protection of the vendor and not for the protection of the vendee. It was imposed in order that the seller might retain title for security not only against the buyer, but as against third parties.

8. It can not be said in the instant case that at any time the parties to this contract contemplated or intended that payment was a condition precedent to passing of title. We can not conceive that such a condition precedent should have been imposed or intended so that the vendor (contractor) might retain title as security against the Government of the United States.

9. Article V of the contract provides as follows:

"ARTICLE V.—*Price or Compensation.*—The contractor upon furnishing the supplies and material, and performing the services, to be furnished and performed by him hereunder, in accordance with the terms and conditions of this agreement, shall upon acceptance by the United States of said supplies, materials, and (or) services, be paid the consideration specified in the said order, which consideration shall be paid at the office of the party of the first part, and as soon as practicable after the acceptance of said supplies, materials and (or) services, in funds supplied by the United States for such purpose."

And it seems that this article positively negatives the idea that payment was a condition precedent to the vesting of title.

10. In order that the stipulation contained in the words "so paid for" may be construed as a condition precedent, one of three things is necessary,

(a) The act stipulated for must be performed before performance can be required of the other party.

(b) The stipulation must be mutual and go to the whole consideration of the contract.

(c) The stipulation is of the very essence of the contract.

11. The termination clause, subdivision (b), contained in the contract, is as follows:

"The United States shall reimburse the contractor for such proportion of the contractor's expenditures * * * made by the contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated, plus ten per cent of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property *so paid for* shall become the property of the United States."

The words "so paid for" in this portion of the contract refer to the word "reimburse," and the method of reimbursement as prescribed in Article V, *supra*.

12. Therefore, the clause "so paid for" is not even a stipulation, nor is it a condition. It is simply explanatory and defines the character of expenditures the contractor shall be reimbursed for. It does not in any manner attempt to state a condition precedent to the passing of title. The clause "so paid for" does not go to the whole consideration of the contract. In fact, it has nothing to do with the consideration, and is certainly not of the very essence of the contract. Therefore, it is clear that neither of the three cardinal features which are laid down in the authorities as necessary in order that a condition precedent may be established, exist.

13. The words "so paid for" are, therefore, neither a condition precedent nor a condition subsequent, but are merely descriptive and explanatory.

14. In construing the contract, we should look to the intention of the parties, and in the present case, it was clearly the intention of both parties to the contract that legal title to the property in question pass to the United States upon the suspension of production, and upon the taking of an inventory of the goods. Had the contractor disposed of this property at a price higher than its cost, clearly the profit would accrue, not to the contractor, but to the United States.

15. This contention is further carried out by the provisions of Supply Circular No. 111, as follows:

"Such supplemental contract shall also provide that all raw materials, partly finished products and finished products on hand

shall become the property of the United States, unless and to the extent that the parties agree that such materials and products shall remain the property of the contractor, in which event the Government shall be credited with the agreed value of the same."

16. This clearly shows that the Government on the termination of this contract regarded itself as the owner of and entitled to the raw materials and partly finished product on hand especially procured for performance of the contract, and expected to take possession of this material and felt obligated to pay the contractor the cost of the same, unless a sale of this material could be effected to the contractors.

17. In accordance with the foregoing, this Board holds that the title to the raw materials and unfinished product actually passed to the Government upon the notice of termination, and the contractor is entitled to the cost of the raw materials and unfinished product which were destroyed in the fire.

18. None of the material, either finished, in process, or completed, was ever delivered to the Government. The contractor should be reimbursed its actual expenditures covering the bonding of its warehouse, inward handling charges, salaries and overhead, and storage.

19. As title to the finished and partly finished product, the bare wire which had been delivered by the Government for insulation, and the raw material passed to the Government upon the notice of suspension, the item of storage is also a proper charge, as is also, under the terms of the agreement, 10 per cent on expenditures other than plant and equipment.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for the proper action.

Col. Delafield and Mr. Hamilton concurring.

Case No. 1224.

In re CLAIM OF DEWEY BROS. CO.

1. **IMPLIED CONTRACT—SHIPMENT UNDER FORMAL CONTRACT DIVERTED.**—Where claimant had a formally executed contract to supply hay to the Government at Camp Gordon, Ga., and actually consigned a carload to that camp, but for some unknown reason the hay was delivered at Camp Lee, Va., and used there at a time when the market price was higher than the contract price, claimant is entitled to receive the market price prevailing at Camp Lee at the time when the hay was thus taken by the Government.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied agreement for the value of a carload of hay shipped, but not delivered, under a formal contract, because the car was diverted from one cantonment to another. Held, claimant is entitled to the market price of the hay at the time and place of delivery.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$444.11, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant entered into a formal contract with the United States under date of August 25, 1917, by the terms of which it was to furnish hay at Camp Gordon, Chamblee, Ga. The claimant also had a contract for delivery of hay at Camp Wheeler, Macon, Ga., some of the questions in respect of which are considered by this Board in the case of the Dewey Bros. Co. found in the Decisions of the Board of Contract Adjustment, Vol. I, page 38. It is there held that this Board has no jurisdiction of the claim for the reason that it presented a case involving unliquidated damages arising out of a breach of a formal written contract.

3. The claimant shipped a carload of hay containing 27,330 pounds from Perrysville, Ohio, consigned to Camp Gordon shortly before December 30, 1917. Through a mistake this car was delivered at Camp Lee, Va., on December 30, 1917. The reason for the mistake does not appear. The contents of the car were immediately unloaded and used at Camp Lee. The contract price for

the hay to be delivered at Camp Gordon was \$1.22 per hundred pounds, or \$24.40 per ton. The quartermaster at Camp Gordon sent a voucher to the claimant for this hay at the Camp Gordon contract price. The claimant refused to accept the voucher and claims that it is entitled to receive the market price at the time of delivery and acceptance of the hay at Camp Lee. The market price for this kind of hay on December 30, 1917, is said to be \$32.50 per ton.

4. It appears that the quartermaster at Camp Gordon not receiving the requisite amount of hay from the claimant as required by the contract purchased hay in the market and paid \$38.50 per ton therefor. The amount so paid was charged against the claimant and deducted from the amount due it under its Camp Gordon contract.

DECISION.

1. The claimant should be paid for the hay which was accepted and used at Camp Lee. The question is whether it should be paid the amount which the quartermaster at Camp Gordon paid for hay that the claimant failed to deliver, which was \$38.50 per ton, which was deducted from the amount due the claimant on the Camp Gordon contract. This amount can only be paid on the theory that the delivery of hay at Camp Lee was in performance of the contract to deliver hay at Camp Gordon and that quartermaster at Camp Gordon was in error in charging the claimant for the amount which he paid for hay. This will not do for the reason that delivery of hay at Camp Lee is not a performance of the contract to deliver hay at Camp Gordon, and the evidence plainly shows that neither the quartermaster nor the claimant considered that delivery of hay at Camp Lee was a performance of the contract to deliver hay at Camp Gordon. It appears that the quartermaster at Camp Gordon treated the failure of the claimant to deliver the hay to Camp Gordon as a breach of the contract, and he is clearly right. The claimant does not contend that the Camp Gordon quartermaster is wrong.

2. The second possibility is that the claimant should be paid his contract price. This is not the answer for the reason that the hay was not accepted as a performance of the contract and no one has ever considered it as having been so accepted, and the evidence demonstrates that the hay was not delivered in performance of the contract.

3. The third possibility is that the claimant is entitled to the same price that any other dealer would be entitled to who had had his hay accepted by the United States and used, to wit, the market price at Camp Lee at the time of its delivery to the quartermaster there. This is the only theory that is consistent with the facts and that is

the amount which the contractor is entitled to receive. What the market price for the hay was on December 30, 1917, at Camp Lee remains to be determined.

4. It is true that the Government might have accepted the hay at Camp Lee as a performance of the contract to deliver hay at Camp Gordon and might have waived the breach of contract by the contractor, but that is exactly what the Government did not do. It chose to regard the failure to deliver the hay at Camp Gordon as a breach of the contract and to charge the contractor for the loss by reason of its breach. It may be said that if the United States now desires to take the position that it made a mistake in treating the failure of the claimant to deliver the hay at Camp Gordon as a breach of contract, and that it should have accepted the delivery of the hay at Camp Lee as a performance of the contract to deliver hay at Camp Gordon, it is not now too late for it to correct its error, to waive the breach and to return to the contractor the cost of the hay at \$38.50 per ton, which was the amount which the Government paid to replace the hay which was not delivered at Camp Gordon. This would amount to a waiver on the part of the United States of an undoubted breach of contract by the contractor, and there is no evidence in the record either that the United States has any such intention or that if it has the right at this time to waive the breach of contract it has any desire to do so. No one will have the hardihood to contend that the United States may on the one hand charge the contractor the cost of replacing the hay at \$38.50 a ton on the ground that the contractor broke its contract, and on the other hand that it owes the contractor the contract price of \$24.40 a ton only for the reason that the delivery of the hay at Camp Lee was in fulfillment of the contract.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

(Before payment is made of the amount found to be due the claimant it is suggested that the situation in respect of the claims of the United States against this contractor for breach of its Camp Wheeler contract be ascertained.)

Col. Delafield and Mr. Howe concurring.

Case No. 255.

In re CLAIM OF THE BROWN BAG FILLING MACHINE CO.

1. **IMPLIED CONTRACT.**—Where claimant, who was patentee and manufacturer of a certain machine designed and used for packing seeds, was instructed by authorized officers and agents of the Government to withdraw all of its machines from its licensees, and to collect these and all others and to adapt them for packing soluble coffee, and to place said machines when so adapted with certain concerns, for the purpose of packing coffee, and claimant complied with said instructions and by reason thereof made expenditures and suffered losses, a contract is implied within the provisions of the act of March 2, 1919, by which the Government is obligated to reimburse claimant the expenditures made and to compensate it for losses sustained in executing said instructions.
2. **CLAIM AND DECISION.**—This claim is made under act of March 2, 1919, Form B, for expenditures made and losses sustained under an informal contract. Held, that claimant is entitled to relief.

Mr. Harding writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$7,650, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On May 30, 1918, a telegram was received from the commanding general in France directing that thereafter all shipments of soluble coffee must be packed in individual portions of one-fourth of an ounce each. At the time of the receipt of this cablegram by the Quartermaster General, E. F. Holbrook was in charge of the coffee branch of the subsistence department of the Purchase, Storage and Traffic Division, and was the superior officer in charge of the depot quartermaster's office in New York, and another officer, Lieut. T. J. Israel, afterwards succeeded by Lieut. S. S. De Hoff, was in direct charge of that depot. At that time some member of the claimant in this case, the Brown Bag Filling Machine Co., of Fitchburg, Mass., had invented, and the claimant company was manufacturing and renting out to users a packing machine used for the purpose of packing garden seeds, some of which were then in use in the Agricultural Department.

2. Mr. E. F. Holbrook, in charge of the coffee branch of the Subsistence Department, directed attention to the claimant's machine, and July 21, 1918, directed Lieut. T. J. Israel to do such things as were necessary, if possible, to utilize the machines of the claimant. Lieut. T. J. Israel instructed the claimant to make certain changes in its machines in order to make them adaptable for the use of packers of soluble coffee who might be operating under Government contract. This was done and machines were installed at the factory of the George Washington Coffee Refining Co., at Brooklyn, N. Y., and at the factory of the Baker Importing Co., at Minneapolis, Minn., under the direction and inspection of Lieut. T. J. Israel, and the George Washington Coffee Refining Co. and the Baker Importing Co. were instructed to install immediately a sufficient number of claimant's machines to pack their entire product and were informed that they were to be paid "a compensating advance price for their product when packed in this style to be paid as rental to claimant for its machines." Lieut. T. J. Israel, Q. M. C., was acting under the direct authority of the zone supply officer at New York, Capt. George G. Andrews, authorized thereto by the chief of the coffee branch of the Subsistence Department.

3. Somewhat later, Lieut. S. S. De Hoff, Q. M. C., directed the claimant to gather in from its customers and from whatever sources it could, a sufficient number of machines and to place them in the factories of some six manufacturers of soluble coffee to pack into individual portions of one-fourth of an ounce each an output of 42,500 pounds daily. The statement of Lieut. Israel to the claimant in the first instance was that the claimant should receive its pay through the manufacturers and by arrangement with them by the Government for an advance price with which to pay claimant. Such arrangement was made and compensation arranged with the George Washington Coffee Refining Co., the Baker Importing Co., and the claimant. By direction of Lieut. De Hoff and by agreement with the claimant, machines were installed with

1. The Soluble Coffee Co. of America, Tatamy, Pa.
2. Arbuckle Bros., Brooklyn, N. Y.
3. Chas. E. Hires, Philadelphia, Pa.
4. C. F. Blanke Tea & Coffee Co., St. Louis, Mo.
5. Kellogg Toasted Corn Flakes Co., Battle Creek, Mich.
6. Nellon Institute, Detroit, Mich.

Upon the same basis claimant raised the question as to its pay providing peace should be declared or the war be over before the machines could be gotten fairly into operation and it become compensated through the manufacturers, and was told by Lieut. De Hoff that in the event of such happenings the claimant would be taken care of undoubtedly, but that the important thing was to get together the machines and get them installed as rapidly as possible.

4. Following these instructions the claimant withdrew a large number of machines from the Agricultural Department of the Government, where they were in use, also withdrew a number of machines from private customers where they were in use at minimum rentals, declined to fill orders for new machines, and assembled quantities of these machines at points convenient for installing them in the six other plants mentioned. Eight machines were actually installed in the plant of the George Washington Coffee Refining Co. at Brooklyn, N. Y., and nine machines were installed at the plant of the Baker Importing Co., at Minneapolis, Minn. The only coffee packed and shipped was in 3,000,000 packages by the George Washington Coffee Refining Co., Brooklyn, N. Y., for which that company paid the claimant as per the agreement 25 cents per 1,000 packages, or \$750. All the machines shipped to the George Washington Coffee Refining Co. were installed by the end of October, 1918, and those which were shipped to the Baker Importing Co. were shipped and the installation just completed on the day of the armistice. November 1, 1918, is fixed as the date when Lieut. De Hoff instructed the claimant to gather in its machines for the other coffee manufacturers.

5. On the day after the armistice, notice was given by the Quartermaster's Department to the coffee manufacturers to suspend all operations under orders of the Government for soluble coffee, and to the claimant to suspend all operations under its instructions as to providing machines, thus leaving the claimant without the promised market for the rental of its machines. Subsequent to this time the machines which were installed were withdrawn from use, and they with the other machines which had been gathered together for the purposes of the Government were subject to be put into commercial use. At the request of the Government the claimant had expended considerable sums of money to adapt its machines to the Government purposes and to assemble them at various points as requested by the Government, and had lost its usual rents or royalties on the machines.

6. Before the claimant entered into these transactions with the Government its custom had been to rent out its machines to private customers at a certain price per thousand envelopes packed, which should amount at least to a minimum royalty of \$100 per annum per machine.

DECISION.

1. It appears from the evidence in the case that when the cablegram was received from the general in command of the American Expeditionary Forces in France directing that all of the soluble coffee thereafter shipped should be placed in individual packages

of one-fourth of an ounce each, Mr. E. F. Holbrook, a civilian officer acting under the authority, direction, and instruction of the Secretary of War, was in charge of the coffee branch of the Subsistence Division of the Quartermaster, and that at the same time, Lieut. T. J. Israel, and succeeding him, Lieut. S. S. De Hoff, were connected with the depot quartermaster's office in the city of New York, and were both of them officers acting under the authority, direction, and instruction of the Secretary of War. This cablegram was received from France on May 30, 1918, and Mr. Holbrook set about at once in trying to find some method of placing soluble coffee into packets of one-fourth of an ounce each, as directed. Immediately after receiving the cablegram he undertook certain experiments to ascertain whether or not such coffee could be packed in cakes. After experimenting for some time, he found that to be impossible, and that the very fact of putting coffee in cakes destroyed its quality as soluble coffee, and thereby defeated its purpose as an emergency part of the ration of the combat troops in France. He either knew or ascertained that the claimant was the inventor and manufacturer of a machine which was in use in the Department of Agriculture for packing garden seeds, and which, he conceived, was adapted, or by making some changes might be adapted, for the purpose of the Government in packing the coffee as required. On July 21, 1918, he directed the depot quartermaster at New York to make an investigation of these machines, and thereupon and from that time forward almost continuously from July 21, 1918, until the date of the armistice Lieut. Israel, and succeeding him, Lieut. De Hoff, were with the claimant at its factory at Fitchburg, Mass., at the George Washington Coffee Refining Co., Brooklyn, N. Y., and in the Department of Agriculture at Washington, and, perhaps, in some other places, experimenting with great diligence with the machine for the purpose of adapting it for use in packing coffee as required, and one or the other of these gentlemen was all of the time urging, exhorting, and going almost to the point of commanding the claimant, its officers and agents, to proceed diligently with the experiments, and, above all things, to make such changes as might be necessary in the machine, and also to make such changes in the containers as to render them fit for the purpose required. It was a matter, apparently, in which great haste was desired. The experiments proceeded; changes were made in the machines; changes were made in the containers at the expense of the claimant so rapidly and diligently that the quartermaster's depot in New York reported to the Coffee Branch of the Subsistence Division in Washington that the machines were an assured success. This report was made under date of August 5, 1918.

2. At the same time of making these experiments for adapting the machines to their purposes, the quartermaster's depot in New York was in communication with manufacturers of soluble coffee all over the country, and at that immediate time particularly with the George Washington Coffee Refining Co., at Brooklyn, N. Y., and the Baker Importing Co., at Minneapolis, Minn.

3. About that time, or soon after, a cablegram was received from the commanding general of the American Expeditionary Forces in France, asking for a large increase in the production of soluble coffee, although the Army at the time was taking the country's entire production, and to comply with Gen. Pershing's request would mean an increase of soluble coffee of over 2,100 per cent. The quartermaster's office immediately put itself in communication with various concerns all over the country with reference to having them produce soluble coffee, and in the meantime had discovered an entirely new process whereby soluble coffee would be quickly produced. At the same time the quartermaster's depot in New York instructed the claimant to gather together enough machines to pack at least 42,500 pounds of soluble coffee daily, and to hold them in readiness to be installed in the factories of the

George Washington Coffee Refining Co., Brooklyn, N. Y.

The Baker Importing Co., Minneapolis, Minn.

Soluble Coffee Co. of America, Tatamy, Pa.

Arbuckle Bros., Brooklyn, N. Y.

Chas. E. Hires, Philadelphia, Pa.

C. F. Blanke Tea & Coffee Co., St. Louis, Mo.

Kellogg Toasted Corn Flakes Co., Battle Creek, Mich.

Nellon Institute, Detroit, Mich.

4. The matter assumed at this time such proportions that the claimant began to make inquiries as to how it was to receive its pay for doing the work in preparing these machines for use, and for the use of the machines after they were installed. In the first instance both it and the manufacturers of coffee had been told that the coffee manufacturers would be paid "a compensating advance price for their production when packed in this style," and from this "compensating advance" the claimant was to receive from the coffee manufacturers 25 cents per thousand packets. But the question arose then between Lieut. De Hoff and Mr. Brown, of the claimant company, as to what would become of them should an armistice or peace be declared before the machines were put in operation, and, as Lieut. De Hoff himself writes, he told the claimant that in the happening of such an event the claimant would be taken care of, undoubtedly. Mr. Holbrook in a telegram placed the largest number of machines that might be required at 140. Also he telegraphed to

the depot quartermaster at New York that the idea of his department was that the cost of the rental of the Brown bag-filling machine would be borne by the contractor furnishing the soluble coffee to the Government, and that a compensating increase in price would be paid to the contractor covering the cost of the Brown Bag Filling Machine Co.'s rental and services, the Government thereby paying this rental through the Government contractor. Thereupon there were installed at the factory of the George Washington Coffee Refining Co., Brooklyn, N. Y., eight machines, which were completely installed a short time before the armistice and which produced three-million packets as required, and for which the claimant received 25 cents per thousand packages, or \$750. There were also installed at the Baker Importing Co., at Minneapolis, Minn., nine machines, which were only completely installed on the day the armistice was declared. All of these machines so installed were installed under the direct supervision of Lieut. Israel or Lieut. De Hoff, so that it appears that at the signing of the armistice eight machines were installed in the factory of the George Washington Coffee Refining Co., nine machines were installed in the factory of the Baker Importing Co., and 53 machines had been assembled at different points in the country ready to be installed, when ordered, in the other factories above named. These machines were obtained by the claimant by withdrawing a large number from the Department of Agriculture, with the Government's consent, and by withdrawing from its various customers a part of the machines in use by each customer, leaving with such customers some of the machines which they had in use so as not to cripple the seed-packing industry. The claimant spent a considerable amount of money in making the changes in the machines required to adapt them for the purpose of packing coffee, it expended money in assembling its machines at different points in the country for use in the various factories, and it lost some rentals by reason of withdrawing the machines from the use of customers, and perhaps had some other losses. The armistice came and the Government directed cessation of operations without furnishing the claimant the promised compensation for the use of its machines. The claimant, however, had been paid by the coffee manufacturers for the containers furnished and for such of the coffee as had actually been packed.

5. The above facts evidence a contract between the Government and the claimant by which claimant agreed to and did furnish a certain number of its machines for the use of the Government or for the benefit of the Government, and that it withdrew from customers, and assembled other of its machines at the direction of Government officers, and that it expended time and labor in and about adapting the machine for the purpose required, and that it expended money

in doing so, for which the Government agreed to pay to the claimant such amount as would reasonably reimburse the claimant its legitimate outlays and for the use of the machines. The Comptroller has said (21 Comptroller's Decisions, 134) :

“ When the Government by its duly authorized officer requested a service * * *, it promised either expressly or impliedly to reimburse the contractor for the reasonable value of such services if rendered as requested. It would be a strange rule of law that would deny to the parties competent to contract for services needed all power or authority to contract for such services without fixing the price in advance or to agree as to the reasonable value of such services as contracted for. I know of no such rule of law. Parties competent and authorized to contract with reference to services are competent and authorized to agree, if they can, as to the value of such services after, as well as before, they are rendered.”

6. We hold, then, that the claimant is entitled to recovery from the Government for its costs and expenses in and about making its machines adaptable to the requirements of the Government, and for such parts of its expenses in installing its machines in the factories of the manufacturers of soluble coffee so far as they did install their machines and have not been paid therefor; that the claimant is also entitled to receive from the Government its costs and expenses in and about assembling its machines for distribution to other of the factories than those in which they were installed as directed by the officer of the Government; and that the claimant is also entitled as rental or for use of each machine, for such length of time as its machines were reasonably withdrawn from its usual customers, and by reason of having been requested by the Government to make such withdrawals, and that such rental is to be measured by the usual rentals and royalties received therefor by the claimant from its customers in the prewar period. The whole amount not to exceed the amount claimed.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield, Mr. Eaton, and Mr. Huidekoper concurring.

Case No. 374.

In re CLAIM OF THE MASSILLON ELECTRIC & GAS CO.

1. **CONSTRUCTION OF ELECTRIC POWER LINE—NO AGREEMENT.**—Where claimant constructed an electric power line at the urgent request of a member of the War Industries Board, who promised claimant to do all he could to help claimant out on the cost thereof if a bill then before Congress enabling it so to do should pass, there is no agreement, express or implied, whereby the Government is obligated to pay any of the expenses thereof.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$21,585.93, for extra expense in constructing an electric power line. Held, claimant is not entitled to recover.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$21,585.93, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claim is one for the excess in the cost of constructing a connecting power line between Massillon and Canton, Ohio, over the prewar cost of such a line.

3. The claimant company generates electric current at its plant in Massillon, Ohio, and it was the sole source of supply of electricity for the industries in that city. The most important of these industries was the Central Steel Co., but there were a number of other manufacturers in Massillon, all of whom were dependent upon the claimant for their power and all were engaged to their capacity during the year 1918 on Government contracts.

4. During the early months of 1918 the total capacity of the claimant company was 8,250 kilowatts per hour. The demands of the industries of Massillon were so great that the claimant corporation developed more than 9,000 kilowatts per hour and in so doing strained its machinery to the utmost and there was constant danger of a breakdown. During February and March, 1918, there were several conferences between the officers belonging to the Power

Section of the War Industries Board and the officers of the claimant company in relation to the situation at Massillon and the danger of a breakdown of the claimant's plant was considered, together with plans for increasing the supply of power in Massillon. The claimant had a project for constructing another plant at Bolivar, Ohio, which would have relieved the situation but the cost of constructing this plant would have been large, the time necessary to complete it would have been at least a year, and the obstacles to financing such a plant were insuperable. The other suggestion was to construct a connecting line between the claimant's plant at Massillon and the plant of the Central Power Co. at Canton, Ohio. This plan was objected to by the claimant since the cost of such a line would be excessive at that time, it would not be profitable to the claimant, it would require it to purchase its power from another company at a rate above that which it was able to secure for the current, and the Central Power Co. had but little, if any, more current than it needed for its own customers in and around Canton.

5. Nothing had been done in the matter up to April 3, 1918, when a fire occurred in the claimant's plant which was caused by operating the plant beyond its capacity. As a result of the fire the claimant was unable to supply power for a number of days and the industries at Massillon were forced to shut down, and the serious nature of the situation became more than ever apparent.

6. Mr. Frederick Darlington, a member of the War Industries Board and chief of the Power Section, had before April 1, 1918, caused a survey to be made of the power situation in the Pittsburgh, Pa., district and eastern Ohio. This work had been done by engineers acting under Mr. Darlington, of whom Maj. Lacombe, Maj. Shaw, and Maj. Damon testified at the hearing before this Board. The conclusion of the engineers was that a tying line between Massillon and Canton was a vital necessity. The claimant was still unwilling to construct the connecting line for the reasons that had previously been given. Mr. Darlington talked with the claimant's officers and he testified that he used all the power which the War Industries Board had to compel the claimant to build the connecting line. We quote from his testimony on page 39 of the transcript:

"The Massillon-Canton line was needed for war industries work but that line would not pay an adequate return for either the Massillon Co. or the Canton Co. to build because there would not be enough profit in that power as Mr. Custer has stated; and yet we asked them to build it. We could not force them legally to do it, but used all the authority we had to get them to build this line."

Maj. Lacombe, who had charge of the power survey in the Massillon-Canton district, testified that the construction of the connecting line was essentially the proper thing to do, and that the fire on April 3 demonstrated how dangerous it was not to have an addi-

tional source of power. We quote from Maj. Lacombe's testimony as follows:

"Q. Had you discussed it (the matter of building the Massillon-Canton line) with any representatives of the Massillon Co.?—A. Yes; I discussed it with Mr. Custer several times. It was not a thing they wanted to do because they would have to take current from another company who naturally wanted a profit on their current. It complicated their situation somewhat and it was not a thing they would have done but he saw the necessity of it and as I pointed out to him from my plans it was impossible for him to continue running his station as he was running it without some breakdown. He was doing it as successfully as I have ever seen it done.

"Q. So it was necessary for him to build this line?—A. It was necessary for him to build something sooner or later as his plant would break down, but that is not the point we urged on him. I urged upon him that he must build that line because the Government needed the power at Massillon.

"Q. Did you discuss finances with him?—A. Yes, but there was nothing I could tell him about the financing beyond this: We knew we had to have this production at Massillon; we had to have that power: we must have it assured to us, but that I did not know any way in which provision was being made by which he could be paid; but I knew from the general situation, which was that the power was exhausted, and we must have more power to win the war and if we did not have it we could not produce equipment for the soldiers, and I assured him that the Government would take care of the situation and that if he would build this line he would be reimbursed for his expenditures.

"Q. Did you suggest any way in which it could be done?—A. No, sir; because I did not know."

Maj. Shaw testified that he told Mr. Custer (claimant's general manager)—

"probably in about these words, that the line would have to be built and that they would have to do it whether they wanted to or not and that I would recommend that this line be built.

"Q. What was said about financing it?—A. I do not think anything was said. That question, of course, worried him more than it did us. I probably told him that there was no way of financing it now and that they would have to build it, and if there was ever a way to get it paid for, acknowledging as we did that it was a financial expense to them, we would do all we could to see that they were paid for it. Several months afterwards I asked him how he was financing it and he told me through the Central Steel Company, but I did not know any of the details at that time. I think possibly the Massillon Company is in a lame condition, due to the fact that they did not refuse to build the line when we told them to and force us to compel them to do so. I know that in a similar case, where the parties were less patriotic, I had to tell them that if they did not get together and did not supply their customers they would be commandeered, but in this case it seems that the Massillon Company acknowledged their responsibility and were willing to go ahead.

"Q. Did Mr. Custer ever say to you that he hoped to be reimbursed by the Government?—A. Yes; I think practically in those words.

"Q. When was that?—A. I think the second time I was there—the day after the fire. He said, practically, we will go ahead with this, but we will have to look to the Government for our money. I probably told him that he had an A-1 case and that we would do all we could to assist him in getting his money.

"Q. Did you explain to Mr. Custer the authority you had?—A. I think so; yes.

"Q. Do you recall what you told him?—A. I told him we had no authority to order him to spend money and that our recommendations were simply recommendations, as far as I was concerned; that I was not giving him any instructions, and that I was to report to Washington."

Maj. Damon testified that he urged the claimant to construct the connecting line and that he told its general manager, Mr. Custer, that the Government always had paid and he thought always would pay for what it got and that he would use his influence to see that whenever it was legally possible the claimant would not have to stand any loss.

7. Mr. Custer testified on behalf of the claimant that he understood that Mr. Darlington had no authority to enter into any binding agreement in behalf of the Government but that if an appropriation became available he would use all the power that he had to assist the claimant in financing the cost of the connecting line. We quote from his testimony as follows:

"Q. You understood that the Government would pay you for the cost of this line?—A. No, sir; I did not. I understood there was no appropriation at that time set aside to take care of emergencies of this nature, but should there be any appropriation by which the Government could reimburse us for the cost or excess cost, we would be recommended to the Government for reimbursement. It was a very bad situation there and it was not the time to haggle about it. The Government had to have the materials being made there and it was our duty to see that the situation was relieved."

Mr. William R. Bump testified in behalf of the claimant that he was the chief engineer of Henry L. Doherty & Co., who were the operators of the claimant company and other companies. That he had several conferences in relation to the situation at Massillon with Mr. Darlington, who stated that the transmission line between Massillon and Canton was an absolute necessity and that he realized that the Doherty Co. had been cooperating with him and with his department both in this and in many other situations to the full extent of their ability, and that he would regret having to ask the aid of the Secretary of War or the Secretary of the Navy to commandeer the claimant's facilities at Massillon; that a measure was then before the Congress which had the approval of the Administration which if passed would provide for funds for the relief of a

situation like that at Massillon, but that at the present they had no specific funds to cover the expense of constructing the Massillon-Canton line; that every effort would be made by both himself and the Board which he represented to secure an appropriation to cover the cost of this line, also that Mr. Darlington aided the claimant in securing a loan from the Central Steel Co. for the construction of the line, and said that he felt certain that the claimant would be reimbursed in accordance with the plans that were then pending. He testified also that the Government engineers aided the claimant in getting rights of way, and the Priorities Board helped in getting materials, and that Mr. Darlington secured modifications in the contract with the Central Power Co. for power that made it more favorable to the claimant; and further that if the connecting line had not been built in 1918 it probably would have been built in 1919 at a smaller cost, and that the Massillon-Canton line had been put in operation in the latter part of 1919 under a contract with the Central Power Co. which would probably be a profitable one to the claimant, and that they would undoubtedly keep the line permanently "for a tie-in for mutual protection regardless of whether they sold current to each other or not."

8. The claimant yielded to the urgings of Mr. Darlington and the officers of his section, and shortly after the fire of April 3 began the construction of the connecting line. It was able to make an arrangement with the Central Steel Co. of Massillon by which the latter company supplied the claimant with sufficient money to enable it to construct the line. Mr. Darlington assisted by persuading the Central Power Co. to reduce somewhat its charge for current and the other officers of the Government aided in securing material for the line and in obtaining rights of way. The connecting line was practically completed on November 11, 1918, but it was not used until the latter part of 1919.

9. The cost of the construction was about \$80,000 and the claimant estimates that the ordinary cost of construction would be about \$20,000 less. The extra cost of construction was due to several reasons, among which may be mentioned the increased cost of some of the materials, the fact that much of it was shipped by express instead of by freight, and the fact that the line was built in haste.

10. The connecting line between Massillon and Canton was not put into operation until the fall of 1919. At about that time a satisfactory contract was made between the claimant and the Central Power Co. by which the claimant obtained current from the Central Power Co. at a price that enabled it to sell the current to its customers at a profit. The connecting line is now a valued addition to the claimant's property, and it is expected to be even more useful in connection with plans for growth which the claimant contemplates. There was testimony from the claimant's witnesses that if

the tying line had not been erected in 1918 it probably would have been erected in 1919.

DECISION.

1. The facts show clearly that the claimant made expenditures for the construction of the connecting line between Massillon and Canton that it did not wish to make and that it constructed a line that it would not have built during 1918, except in response to the urgings of Mr. Darlington and the officers connected with the Power Section of the War Industries Board.

2. It is evident also that neither Mr. Darlington nor the officers under him intended to place the United States under a legal obligation to reimburse the claimant its losses in the construction of the connecting line, and that the claimant understood that in responding to the solicitation of Mr. Darlington and the others, it was not entering into an agreement with the United States, either express or implied. The claimant knew that although Mr. Darlington and the other officers used language that sounded peremptory, yet they had not the power to compel obedience from the claimant. The Massillon-Canton line was constructed by the claimant in the hope, or, at the most, with the expectation that some relief might be given it under an act of Congress that might or might not be enacted. The tying line is now being operated by the claimant and it is found to be an integral part of its plant, if not indispensable to its present operation and future well being.

3. It is not necessary to determine in this case whether or not the War Industries Board had the power to enter into an agreement on behalf of the United States by the terms of which the United States would be obliged to reimburse the claimant the extra cost of constructing a connecting line like that described in this claim. Neither the claimant nor Mr. Darlington had in mind in constructing the connecting line that any contractual relation would be established between the claimant and the United States. The fact that the claimant yielded to the urging of Mr. Darlington and the officers under him shows that the claimant was desirous of performing the duties that were incumbent on it to perform during the emergency. The record and the testimony fall short of establishing that the relationship between the claimant and the United States in the matter of building the connecting line was a contractual one or one from which a contractual obligation on the part of the United States may be implied. Under all the circumstances the claimant is not entitled to relief.

DISPOSITION.

A final order will be entered denying the claimant any relief.
Col. Delafield, Mr. Bayne, and Mr. Huidekoper concurring.

Case No. 1732.

In re CLAIM OF A. MENDELSON & BRO.

1. **AMENDING CONTRACT.**—Where a contractor has a formal contract with the Government for the making of wool trousers at 65 cents per pair, and during the performance the contractor complains about the price, and the Chief of the Clothing Section writes the contractor that the price will be raised to 75 cents per pair, there is no binding contract relative to the raise, for the reason that the amendment is without good consideration moving to the Government and beyond the authority of the officer to make.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$32,500, on an alleged agreement to raise the price of the manufacture of wool trousers from 65 cents to 75 cents per pair. Held, claimant is not entitled to recover.

Mr. Hunt writing the opinion of the board.

ORIGIN AND NATURE OF CLAIM.

This is a statement of claim, Form A, filed originally with the Claims Board, Office of the Director of Purchase, and by that Board transmitted here on or about December 5, 1919, for the reason that in the judgment of the said Board there was no written evidence submitted showing the nature, terms, and conditions of the alleged agreement.

FINDING OF FACTS.

It appears that on or about July 9, 1918, the claimant entered into contract 4433-N for the manufacture of 50,000 pairs of wool trousers at 65 cents per pair. This contract was completed and final shipment made December 9, 1918, and contractor paid at the rate of 65 cents per pair. On August 30, 1918, the claimant wrote a letter, a copy of which follows, to the Quartermaster General's Office:—

“AUGUST 30, 1918.

“QUARTERMASTER GENERAL'S OFFICE,
109 E. 19th St., City. (N. Y. C.)

“Attention Mr. Tully.

“GENTLEMEN: Pursuant to our contract No. 4433-N for 50,000 trousers, wish to inform you that we can not make them successfully, because we are only receiving 65 cents per pair and the Amalgamated Clothing Workers Union who are furnishing our factory with em-

ployees, have set the price for operations based on the higher or 75-cent price.

"We therefore ask you to grant us the higher or the 75-cent price so that we may proceed with our contract and be able to pay our workers the prevailing rate.

"Awaiting an early reply. Yours very truly."

In reply the claimants received the following letter:

"WAR DEPARTMENT,
"PURCHASE, STORAGE, AND TRAFFIC DIVISION,
"OFFICE OF THE DIRECTOR OF PURCHASE AND STORAGE,
"New York City, August 31, 1918.

"From: Acting Quartermaster General.

"To: A. Mendelson & Bro. Uniform Co. (Inc.), 121 West 19th St., New York, N. Y.

"Subject: Contract No. 4433-N, 50,000 wool trousers.

"1. In reply to your letter of August 30th. we have changed all contracts written "65¢" to read "75¢," maximum, subject to revision.

"2. This modification has already been sent through on your contract.

"By authority of the Acting Quartermaster General.

"MANUFACTURING BRANCH,
"By: H. L. WELLS,
"Acting Chief, Clothing Section."

The modification which Mr. Wells states has been "sent through" was never acted upon by higher authority.

DECISION.

1. The above letter signed H. L. Wells may have been a promise on Wells's part to see to it that the price to be paid the claimant should be 75 cents instead of 65 cents per garment. However, such promise was without consideration and was not within his power or that of any other officer to perform, as the amendment promised was disadvantageous to the United States. It further appears that the contract contained the labor dispute clause under which the contractor might have taken action. The claimant should have proceeded under the said labor dispute clause.

2. This case is not within the principle of Greenbaum, Weil and Nichols (No. 402, Oct. 6, 1919) for the reason that in that case action was taken in substantial compliance with clause 11 of the contract therein.

DISPOSITION.

An order will be entered denying the claimant's claim and dismissing its statement of claim.

Col. Delafield and Mr. Harding concurring.

Case No. 298.

In re CLAIM OF BATES & INNES (LTD.).

1. **MODIFICATION OF CONTRACT.**—Claimant had a written contract for the manufacture of woolen spiral puttees, specifying that its product was to be similar in all respects to sample and the sample submitted by claimant contained practically no cotton, but shortly thereafter claimant's agent was shown proposed specifications for puttees which contained 10 per cent of cotton, which specifications were subsequently adopted by the Quartermaster General and copies thereof mailed both to claimant and to the Government inspector at claimant's plant, whereupon claimant commenced to manufacture puttees containing 10 per cent of cotton under the contract previously awarded. Held, that this was a request of the Government to amend the contract and was accepted by the contractor by performance.
2. **SUBSTANTIAL PERFORMANCE.**—Under the above circumstances, where claimant substituted the cotton, not for virgin wool as permitted in the revised specifications, but for wool waste, the variation was so slight as not to bar recovery. Nor does the fact that an analysis showed that some of the product contained 15 per cent of cotton bar recovery.
3. **METHOD OF ADJUSTMENT.**—The contractor will be permitted to deliver the puttees which the Government has heretofore refused, but from the contract price will be deducted the saving effected by the substitution of cotton for wool, and also the additional cost, if any, as provided in the contract, of inspecting some of the puttees in the delivery of which claimant has been delinquent.
4. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an informally executed contract for woolen spiral puttees. Held, claimant is entitled to relief.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Office of the Director of Purchase disallowing the claim of Bates & Innes (Ltd.), of Carlton Place, Ontario, for \$58,277.20, the purchase price of 32,740 pairs of woolen spiral puttees manufactured under an informally executed Quartermaster Corps contract, No. 2077-P, dated April 19, 1918, for 60,000 pairs of puttees, acceptance of which has been refused by the Government.
2. Early in March, 1918, Mr. R. Thompson, jr., representing the claimant, called on Mr. F. E. Haight, chief of the unit goods section, Clothing and Equipment Division, Quartermaster Corps, New York, and negotiated the contract for puttees, which was subsequently entered into as above.

3. The contract provided:

"That the said contractor shall furnish and deliver the following-named supplies * * * and that the supplies so delivered shall be like and equal in all respects to the samples submitted by contractor."

4. Shortly thereafter, and before the contract was awarded, the claimant submitted a sample puttee made of yarn containing 70 per cent virgin wool and 30 per cent noils or "all-wool" waste. The sample puttee contained no cotton.

5. During June and July, 1918, the claimant delivered 14,400 pairs of puttees containing no cotton and during August delivered 19,800 pairs containing 10 per cent of cotton. Late in August the Government discovered that the cotton content of the puttees was beginning to exceed 10 per cent and it refused to accept future deliveries of puttees containing any cotton whatever. The claimant immediately changed its formula for yarn and during November and December delivered an additional 19,800 pairs of all-wool puttees. When the Government refused to accept puttees containing any cotton whatever, the manufacture of the 32,740 pairs for which claim is now made was at a stage of manufacture so advanced as to make it impossible to do other than proceed to their completion. Testimony of the Government witnesses upon the hearing indicated that these puttees contain not more than 15 per cent of cotton.

6. Some time during the month of April, 1918, Mr. Thomson again called on Mr. Haight, who discussed the possible adoption by the Government of standard specifications for the manufacture of woolen spiral puttees. Mr. Haight exhibited to Mr. Thomson a copy of the proposed specifications which were subsequently adopted by the Quartermaster General on June 18, 1918, as "Specifications for knitted spiral puttees, No. 1341." These specifications provided that the "*composition of yarn*" to be used in the manufacture of puttees should be:

"18 per cent white wool— $\frac{3}{8}$ grade; 42 per cent dyed olive drab wool— $\frac{3}{8}$ grade; 30 per cent noils, garnetted threads, or reworked wool clips; 10 per cent dyed olive drab cotton. All free from shives and burrs."

7. During the latter part of June, the claimant and the Government inspector stationed at its plant each received, in Government envelopes and without a letter of transmittal or other accompanying paper, printed copies of Specifications No. 1341, bearing the signature of Brig. Gen. R. E. Wood, Acting Quartermaster General, and the inscription "Adopted June 18, 1918." The "*Composition of yarn*" as prescribed in these specifications was the same as that discussed by Mr. Haight with Mr. Thomson.

8. The claimant states that it assumed from Mr. Thomson's conversation with Mr. Haight that the Government was about to adopt specifications providing for the manufacture of puttees from yarns containing 10 per cent of cotton and that puttees so manufactured would be acceptable under the existing contract. This assumption, it is argued, was further strengthened and justified by the receipt of a printed copy of Specifications No. 1341 through the mail marked "War Department, Office of the Quartermaster General."

9. Mr. Haight testified that his conversation with Mr. Thomson had to do only with the matter of proposed specifications for use under future contracts, and that he did not intend his conversation to be construed as authorizing or directing a modification of the specifications of existing contracts. Mr. Haight was unwilling, however, to deny Mr. Thomson's testimony that when Mr. Haight submitted to him for comment a copy of the specifications subsequently adopted, he did not say in substance: "This is just about what we are going to adopt, what do you think of it?"

10. The testimony shows that the claimant manufactured the first puttees delivered under this contract from a yarn containing 70 per cent virgin wool and 30 per cent of "all-wool" clips or waste, and that it later used a yarn containing 70 per cent virgin wool, 20 per cent wool clips or waste, and 10 per cent cotton.

11. The claimant found, according to the testimony, that by substituting 10 per cent of cotton for 10 per cent of virgin wool the yarn so produced did not work as satisfactorily on its machines, which were not designed especially for knitting of the type required under this contract, as did a yarn made of 70 per cent virgin wool, 20 per cent waste or clips, and 10 per cent cotton. The yarn so produced was better than was required under Specifications No. 1341. The claimant argues, therefore, that because of the nature of the work to be done it felt free to rearrange the percentages of the yarn composition so as to obtain a yarn best suited to the quality of the component raw materials it was able to procure and to the operation of its mechanical facilities, *provided the resulting finished product was always as good as or better than the Government required under Specifications No. 1341.*

12. The claimant testified that the reduction in cost of raw materials resulting from a substitution of 10 per cent of cotton for a like quantity of clips or waste (instead of for virgin wool) was something less than 1 cent on each pair and that there was a labor saving due to the use of cotton of approximately 5 cents per pair. Mr. Haight testified that the total saving should have been about 15 cents. The claimant has offered to accept in settlement of this claim \$1.78 for each pair of puttees ready for delivery and has also agreed to waive any claim it may have against the Government on account

of the suspension of production under the contract at a time when approximately 4,000 pairs remained to be manufactured.

13. The claimant introduced evidence, which was supported by Government witnesses, to show that a puttee manufactured from a yarn containing 10 per cent of cotton would, upon analysis, show a 13 per cent cotton content; and that if wool clips or waste containing a permissible quantity of cotton were used to the extent of 20 per cent in the manufacture of yarn, the percentage of cotton in the finished puttees might run as high as 15 per cent. The testimony of the Government witnesses shows that such puttees would be satisfactory for the use of the Army.

14. The contract provided for delivery as follows:

	Pairs.		Pairs.
During May -----	15, 000	During July -----	30, 000
During June -----	25, 000	During August -----	30, 000

15. Delivery of such puttees as have been accepted by the Government was made as follows:

	Pairs.		Pairs.
During June -----	5, 400	During August -----	19, 800
During July -----	9, 000	During November -----	27, 000

16. The contract provided:

“That in case of failure of the contractor to perform any part of this contract * * * the right is hereby reserved to the United States to elect whether the contractor shall be permitted to continue the performance as to the remaining part * * *. In event, however, of the granting of additional time for performance the cost of inspection and other expenses and damages to the United States over what would have been incurred had performance been accomplished by the time originally fixed therefor, if any, except in so far as the same may arise from delays for which the United States is responsible * * * shall be charged to the contractor and may be deducted from any money due or to become due said contractor from the United States.”

17. Testimony introduced by the claimant upon the hearing indicated that a part of the contractor's delinquency was due to the necessary performance of Canadian Government priority orders, a cause excusable under the contract for a period of not more than three weeks. After granting such an allowance the contractor was delinquent to the following extent:

On June 21, in the delivery of 15,000 pairs,
 On July 21, in the delivery of 31,000 pairs,
 On August 21, in the delivery of 50,200 pairs,
 On September 21, in the delivery of 65,800 pairs.

Upon the suspension of the contract, the delivery of 4,080 pairs was excused.

DECISION.

1. Having elected to permit the contractor to continue performance of the contract, the Government is entitled to a credit of the extra cost of inspection, against any sums due to the contractor. The 63,180 pairs which have already been accepted were, and the 32,740 pairs which may be accepted under this decision, must be inspected subsequent to the time when they would have been inspected had deliveries been made in accordance with the terms of the contract as properly extended. No testimony has been offered of other expenses or damages to the Government because of the contractor's delinquency in the delivery of puttees under this contract. From any payments to be made under this decision, deductions on account of the contractor's delinquency should be limited to a sum to reimburse to the Government the cost of inspection, if any, over what it would have incurred had the performance been accomplished by the time originally fixed therefor.

2. The Government attorney contends that had the claimant actually regarded Mr. Haight's conversation and the subsequent receipt of the printed specifications as it now alleges, it would have substituted the 10 per cent of cotton for 10 per cent of virgin wool as prescribed in the specifications. The specifications were known by the claimant to have been designed to conserve the wool supply available for military requirements.

3. It now remains for this Board to determine whether or not the claimant was justified in regarding Mr. Haight's statements to Mr. Thomson and the subsequent receipt of Specifications No. 1341 as a request of the Government to manufacture puttees covered by existing contracts in accordance thereafter with the new specifications, which, when assented to by the claimant, implied an agreement so to manufacture the puttees and to credit to the Government any saving thus accruing. The testimony upon the hearing leaves no room for doubt as to the good faith of the claimant, and the conclusion is unavoidable that it was justified in so construing the circumstances. The variance from the exact formula for the composition of yarn can not, in view of the circumstances surrounding the performance of this contract which it is unnecessary here to enumerate, be regarded as fatal to recovery.

4. The claimant is entitled, upon the delivery of not more than 32,740 woollen spiral puttees manufactured under this contract and which contain not more than 15 per cent of cotton upon analysis, to be paid the contract price therefor less the saving effected by the use of cotton in the performance of this contract and less the additional cost of inspection, if any.

5. In view of the claimant's expressed willingness to accept payment at the rate of \$1.78 per pair for the puttees so manufactured and of the testimony of Government witnesses, the saving to the claimant due to the introduction of cotton is found to have amounted to 20 cents per pair.

6. Payment therefor shall be at the rate of \$1.78 per pair for the puttees delivered to and accepted by the Government under this decision, less \$396, the saving effected by the claimant in the cost of manufacturing 19,800 pairs of puttees containing cotton heretofore delivered to, accepted and paid for by the Government, less, also, the additional cost, if any, incurred and to be incurred by the Government in inspecting all or any portion of the 95,920 pairs of puttees heretofore accepted and to be accepted by the Government under this contract, in the delivery of all of which the claimant has been delinquent.

DISPOSITION.

1. This Board will cause the amount due to the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Smith concurring.

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Case No. 409.

In re CLAIM OF HAWTHORN MILLS (LTD.).

1. **CHANGE IN SPECIFICATIONS.**—Where claimant had a contract to manufacture spiral puttees like an all-wool sample submitted, and when the Government, through the Quartermaster General, changed the specifications for spiral puttees to be manufactured for Government use, permitting the use of 10 per cent cotton, and such specifications were mailed to claimant and the Government inspector in claimant's plant prior to the completion of the contract, the Government is obligated, under the act of March 2, 1919, to accept and pay the reasonable and fair value of puttees manufactured and delivered by the claimant according to the new specifications.
2. **CLAIM AND DECISION.**—This is an appeal from the decision of the Director of Purchase and is filed upon the theory that the United States Government is obligated, under the act of March 2, 1919, to receive and pay for spiral puttees made to conform substantially to new specifications adopted by the Quartermaster General different from those contained in claimant's original contract. Held, that the Government is obligated to pay the claimant the fair and reasonable value of the puttees manufactured after the receipt of and in compliance with the new specifications.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Office of the Director of Purchase disallowing the claim of the Hawthorn Mills (Ltd.), of Carlton Place, Ontario, for \$7,298, the purchase price of 4,100 pairs of woolen spiral puttees manufactured under an informally executed Quartermaster Corps contract, No. 1548-P, dated March 30, 1918, for 50,000 pairs of puttees, acceptance of which has been refused by the Government.
2. Early in March, 1918, Mr. R. Thompson, jr., president of the claimant in which company Mr. Bates, of Bates & Innes (Ltd.), claimant in case No. 298 involving the same facts and circumstances and decided herewith, is largely interested, called on Mr. F. E. Haight, Chief of the Knit Goods Section, Clothing and Equipment Division, Quartermaster Corps, New York, and negotiated the contract for puttees which was subsequently entered into as above.
3. The contract provided:

“That the said contractor shall furnish and deliver the following named supplies * * * and that the supplies so delivered shall be like and equal in all respects to the samples submitted by contractor.”

4. Shortly thereafter and before the contract was awarded, the claimant submitted a sample puttee made of yarn containing 70 per cent virgin wool and 30 per cent noils or "all-wool" waste. The sample puttee contained no cotton.

5. During June and July, 1918, the claimant delivered 30,600 pairs of puttees containing no cotton and during August delivered, and the Government accepted, 12,600 pairs containing an undetermined percentage of cotton. Late in August the Government discovered the cotton content of the puttees previously delivered and, upon analysis, found that the percentage of the puttees then offered for inspection varied from 14 to 22 per cent. The Government refused to accept future deliveries of puttees containing any cotton whatever. The production of the 4,100 pairs for which claim is now made was then at a stage of manufacture so advanced as to make it impossible to do other than proceed to their completion. All of the puttees, delivery of which has been refused by the Government, contain cotton.

6. Sometime during the month of April, 1918, Mr. Thomson again called on Mr. Haight, who discussed the possible adoption by the Government of standard specifications for the manufacture of woolen spiral puttees. Mr. Haight exhibited to Mr. Thomson a copy of the proposed specifications which were subsequently adopted by the Quartermaster General on June 18, 1918, as "Specifications for knitted spiral puttees, No. 1341." These specifications provided that the "composition of yarn" to be used in the manufacture of puttees should be:

"18 per cent white wool— $\frac{3}{4}$ grade; 42 per cent dyed olive drab wool— $\frac{3}{4}$ grade; 30 per cent noils, garnetted threads or reworked wool clips; 10 per cent dyed olive drab cotton. All free from shives and burrs."

7. During the latter part of June, the claimant and the Government inspector stationed at its plant each received, in Government envelopes and without a letter of transmittal or other accompanying paper, printed copies of Specifications No. 1341, bearing the signature of Brig. Gen. R. E. Wood, Acting Quartermaster General, and the inscription "Adopted June 18, 1918." The "Composition of yarn" as prescribed in these specifications was the same as that discussed by Mr. Haight with Mr. Thomson.

8. Mr. Thomson testified that he assumed from his conversation with Mr. Haight that the Government was about to adopt specifications providing for the manufacture of puttees from yarn containing 10 per cent of cotton and that puttees so manufactured would be acceptable under the existing contract. This assumption, it is argued, was further strengthened by the receipt of a printed copy of Specifi-

cations No. 1341 through the mail, marked "War Department, Office of the Quartermaster General."

9. Mr. Haight testified that his conversation with Mr. Thomson had to do only with the matter of proposed specifications for use under future contracts and that he did not intend his conversation to be construed as authorizing or directing a modification of the specifications of the existing contract. Mr. Haight was unwilling, however, to deny Mr. Thomson's testimony that when Mr. Haight submitted to him for comment, a copy of the specifications subsequently adopted, he did not say in substance: "This is just about what we are going to adopt; what do you think of it?"

10. The testimony shows that the claimant manufactured the first puttees delivered under this contract from a yarn containing 70 per cent virgin wool and 30 per cent of "all-wool" clips or waste, and that it later used a yarn containing 70 per cent virgin wool, 20 per cent "wool" clips or waste, and 10 per cent cotton.

11. The claimant found, according to the testimony, that by substituting 10 per cent of cotton for 10 per cent of virgin wool the yarn so produced did not work as satisfactorily on its machines, which were not designed especially for knitting of the type required under this contract, as did a yarn made of 70 per cent virgin wool, 20 per cent waste or clips, and 10 per cent cotton. The yarn so produced was better than was required under Specifications No. 1341. The claimant argues, therefore, that because of the nature of the work to be done it felt free to rearrange the percentages of the yarn composition so as to obtain a yarn best suited to the quality of the component raw materials it was able to procure and to the operation of its mechanical facilities, *provided the resulting finished product was always as good as or better than the Government required under Specifications No. 1341.*

12. The claimant testified that the reduction in cost of raw materials resulting from a substitution of 10 per cent of cotton for a like quantity of clips or waste (instead of for virgin wool) was something less than 1 cent on each pair and that there was a labor saving due to the use of cotton of approximately 5 cents per pair. Mr. Haight testified that the total saving should have been about 15 cents. The claimant has offered to accept in settlement of this claim \$1.78 for each pair of puttees ready for delivery, and states that it has no claim against the Government on account of the suspension of production under the contract.

13. The claimant introduced evidence, which was supported by Government witnesses, to show that a puttee manufactured from a yarn containing 10 per cent of cotton would, upon analysis, show a 13 per cent cotton content; and that if wool clips or waste contain-

ing a permissible quantity of cotton were used to the extent of 20 per cent in the manufacture of yarn, the percentage of cotton in the finished puttee might run as high as 15 per cent. The testimony of the Government witnesses shows that such puttees would be satisfactory for the use of the Army.

14. The contract provided for delivery as follows:

	Pairs.
During April-----	20,000
During May-----	30,000

15. Delivery of such puttees as have been accepted by the Government was made as follows:

	Pairs.		Pairs.
June 1-----	3,600	July 20-----	10,800
June 8-----	5,400	Aug. 3-----	5,400
June 15-----	3,600	Aug. 17-----	7,200
June 29-----	7,200		

16. The contract provided:

"That in case of failure of the contractor to perform any part of this contract * * * the right is hereby reserved to the United States to elect whether the contractor shall be permitted to continue the performance as to the remaining part * * *. In event, however, of the granting of additional time for performance the cost of inspection * * * to the United States over what would have been incurred had performance been accomplished by the time originally fixed therefor, if any, except in so far as the same may arise from delays for which the United States is responsible * * * shall be charged to the contractor and may be deducted from any money due or to become due said contractor from the United States."

17. Testimony introduced by the claimant upon the hearing indicated that the contractor's delinquency was due to the necessary performance of Canadian Government priority orders, a cause excusable under the contract for a period of not more than three weeks. After granting such an extension the contractor was delinquent as follows: On May 21 in the delivery of 20,000 pairs, and on June 21 in the delivery of 37,400 pairs.

DECISION.

1. The contention of the claimant in this case is precisely the same as in the case of Bates & Innes (Ltd.), Claim No. 298 (2, these Decisions, page 262): That Mr. Haight verbally authorized or directed a change in the specifications for the composition of yarn in accordance with the provisions of Specifications No. 1341 and that because of the nature of the work to be done it felt free to rearrange the percentages of the yarn composition so as to obtain a yarn best suited to the quality of the component raw materials it was able to procure and to the operation of its mechanical facilities, provided

the resulting finished product was always as good as or better than the Government required under Specification No. 1341.

2. In the Bates & Innes case this contention is supported by evidence showing claimant to have actually complied with the provisions of the new formula, i. e., its finished product contained less than 15 per cent of cotton, a percentage reasonably to be expected in yarn manufactured from 10 per cent of cotton, and 20 per cent of waste or clips, having as a permissible allowance, 2 per cent of cotton. The present claimant testified that it did not use more than 10 per cent of cotton as such, in making its yarn, and that any surplus of cotton (more than 10 per cent) appearing in the finished product was due to an excess of cotton in the wool waste or clips used.

3. The proposed specifications exhibited to Mr. Thomson by Mr. Haight and the specifications adopted by the Quartermaster General provided for the use of "30 per cent noils, garnetted threads or reworked wool clips." Noils are pure short wool, and contain no cotton whatever, and their equivalent all-wool clips or waste.

4. The specifications under which a shirting manufacturer operates may permit of a cloth containing as much as 50 per cent of cotton and the varying percentages of cotton in wool clips or waste depends entirely upon the kind of material manufactured in the plant producing the wool clips or waste, from which that by-product is procured.

5. The claimant's purchasing agent could readily have ascertained the nature of the product of the plant from which the waste or clips were purchased. In contradiction of Mr. Thomson's statements, Government witnesses, who readily qualified as experts, testified that the claimant should have been able to recognize the cotton content of the clips before their introduction into the yarn. Thus, the claimant had ample notice of the kind and quality of wool clips or waste which it might use instead of noils, and it had two complete checks upon the quality of the clips or waste used in the performance of this contract.

6. It is asserted by this claimant that because it procured wool waste from American commercial sources, this Government should be responsible for the quality of the material. The control exercised by the Government through the War Industries Board and the Wool Administrator did not extend further than to limit the purchase of wool and woollen by-products to Government contractors and manufacturers producing necessary civilian materials. In order to procure authority for the purchase of wool, it was only necessary to satisfy the authorities that the wool was for an approved use. Having obtained permission to purchase, the manufacturer then located its source of supply and made its own arrangements as to

quality, deliveries, etc. The Government was in no way responsible for the execution of any arrangements made between the individuals.

7. Giving to the testimony in this case the most liberal construction, the claimant is not entitled to any greater measure of relief than was granted to Bates & Innes. It is, accordingly, found that Mr. Haight's statement to Mr. Thomson, and the subsequent receipt of Specifications No. 1341, constituted a request of the Government to manufacture puttees under existing contracts in accordance thereafter with the new specifications, which, when assented to by the claimant, implied an agreement so to manufacture the puttees and to credit to the Government any saving thus accruing. Justice will be done to the claimant if the Government accepts such of the puttees manufactured and delivered under this contract as do not contain more than fifteen per cent of cotton.

8. In view of the claimant's expressed willingness to accept payment at the rate of \$1.78 per pair for the puttees so manufactured and of the testimony of Government witnesses, the saving to the claimant due to the introduction of cotton is found to have amounted to 20 cents per pair.

9. Whether a visual inspection of the finished puttees will disclose the proportion of cotton content or whether a destructive analysis will be necessary is not here determined. It is, however, directed that, *if a proper and adequate inspection of the puttees offered under this decision is found by the Director of Purchase and Storage to be practicable*, then the Government will inspect, accept, and pay for at the rate of \$1.78 per pair, such of the puttees as, upon such inspection, actually contain not more than 15 per cent of cotton; provided, however, that from any moneys to be paid to the claimant under this decision there shall be deducted the extra cost of inspection over that which would have been incurred by the Government had performance been accomplished within the time originally fixed therefor.

10. Having elected to permit the claimant to continue the performance of the contract after it had become delinquent in the delivery of puttees, the Government is entitled, by the terms of the contract, to deduct from any moneys payable under this decision an amount equal to the additional cost, if any, incurred by the Government in inspecting all or any portion of the puttees heretofore delivered under this contract over what would have been incurred had the performance been accomplished at the time originally fixed therefor, to wit, May 31, 1918; and the Government is also entitled to deduct from any such payments the sum of \$252, the saving effected by the claimant in the cost of manufacturing 12,600 pairs of puttees containing cotton, heretofore delivered to and accepted by the Government.

DISPOSITION.

1. This Board will cause the amount due to the claimant to be computed and ascertained in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Smith concurring.

Case No. 408.

In re CLAIM OF HAWTHORN MILLS, LTD.

1. **SUSPENDED CONTRACT—COMMITMENTS—RAW MATERIAL.**—Where the Government suspends a contract before completion, an obligation arises under the act of March 2, 1919, to reimburse the contractor the loss sustained in commitments and on material procured to perform such contract.
2. **FACILITIES.**—Where at the time of making such contracts the parties did not contemplate that additional facilities would be required for the performance thereof and no conversation was had or agreement made with reference thereto, the Government is under no obligation, under the act of March 2, 1919, to reimburse claimant the expenditures made in connection therewith.
3. **SUBSTANTIAL COMPLIANCE.**—Where claimant under such contract and under the circumstances relevant to specifications, has manufactured and has ready to deliver 43,490 pairs of such puttees, the Government is obligated, under the act of March 2, 1919, to accept and pay the reasonable value thereof, if on inspection it is found that there was substantial compliance with the specifications.
4. **CLAIM AND DECISION.**—This claim is presented under the act of March 2, 1919, claimant's theory being that the Government is obligated to reimburse it the loss on material and facilities procured for the purpose of performing the suspended contract, and to accept 43,490 puttees ready for delivery, and to compensate claimant to the extent of the value thereof. Held, claimant should be reimbursed its loss on materials procured for the performance of the contract, and also on account of partly finished product, cloth and yarn, found upon inspection to equal in quality puttees made to conform to new specifications on that part of the contract which was suspended, and for the value of such completed puttees not containing more than 15 per cent cotton, and that claimant is not entitled to be reimbursed for increased facilities.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Office of the Director of Purchase disallowing the claim of the Hawthorn Mills (Ltd.), of Carlton Place, Ontario, for \$169,574.28, of which \$92,162.08 is to cover the difference between the cost of component materials and special facilities procured for the performance of an informally executed Quartermaster Corps Contract No. 2013-P dated April 18, 1918, for 180,000 pairs of puttees, and the market value thereof after the suspension by the Government of production under the contract,

and also to cover charges incident to carrying the component materials; and \$77,412.20 is for 43,490 pairs of woolen spiral puttees, manufactured under the contract, acceptance of which has been refused by the Government.

2. Immediately upon the acceptance and upon the faith of the contract, the claimant arranged for a supply of component materials required for the production of puttees covered by this contract and also procured special facilities needed for its performance as indicated below:

Raw materials on hand, costing.....	\$36,855.62
Partly finished materials, costing.....	32,752.93
Commitments for component materials.....	42,504.98
Special facilities.....	2,535.30

The claimant values the component materials on hand at \$17,532.40, the partly finished material at \$8,396.55 and is willing to allow a total credit of \$25,928.95. Only the unabsorbed amortization of the special facilities is claimed.

3. Included in the claimant's statement of material on hand appears an item, shoddy Yorkshire wool pulled worsted clips, alleged to have cost \$3,285.36; and 10,341 pounds of cloth and 801 pounds of yarn manufactured by the claimant and estimated to have cost \$8,396.55.

4. The facts and circumstances of that part of the claim amounting to \$77,412.20 and growing out of the refusal by the Government, because of the excess content of cotton, to accept the puttees offered for inspection and delivery under this contract are identical with the facts and circumstances in this claimant's case No. 409 (2, these decisions, decided herewith. It was stipulated by the Claimant's counsel and the Government attorney that all the testimony and evidence in that case should be incorporated into the record of the present case.

5. The contract provided for the delivery of 60,000 pairs of puttees during the months of June, July, and August, 1918. The present contract reserved to the Government the same rights in the event of failure of the contractor to perform any part of the contract in accordance with its terms, as did the contract in claimant's case No. 409 and, here, too, the testimony introduced upon the hearing by the claimant indicated that its delinquency was due to the necessary performance of Canadian Government priority orders, a cause excusable under the contract for a period of not more than three weeks. No puttees were delivered to and accepted by the Government under this contract, and thus the claimant has been at all times delinquent with respect to the delivery of the puttees on account of which it now makes claim.

DECISION.

1. The claimant is entitled to be held harmless against loss on account of component raw materials necessarily procured for the performance of the contract and also on account of partly finished product (cloth and yarn), *found upon inspection, equal in quality to that required for the manufacture of puttees in conformity with Specifications No. 1341* and not more in quantity than sufficient for the completion of the contract by the manufacture of 136,510 pairs of puttees, the production of which was suspended by the Government.

2. Under the authority of the decision in claimant's case No. 409 and Bates & Innes (2, these decisions), a cotton content not exceeding 2 per cent in the wool clips or waste and not exceeding 12 per cent in the yarn procured for and made in the performance of this contract will be regarded a permissible variance under the specifications. The claimant should be paid the difference between the cost of such material and partly finished product and the market value thereof, less the cost of inspecting such of the materials and partly finished products, if any, as do not so conform to the specifications.

3. The claimant should also be paid the cost of providing insurance and storage and the cost of handling such of the materials and partly finished product as are found to be in accordance with the specifications.

4. Nothing in the record supports the claim for reimbursement on account of special facilities nor is it suggested that, when the contract was entered into, the need of special facilities was contemplated either by the claimant or the Government. This item, amounting to \$2,535.30 can not, therefore, be allowed.

5. Under the decision in the claimant's case No. 409, relief must be limited to the acceptance of such of the 43,490 pairs of puttees as do not contain more than 15 per cent of cotton, and it is accordingly directed that, *if a proper and adequate inspection of such of the 43,490 pairs as may be offered under this decision is found by the Director of Purchase and Storage to be practicable*, then the Government will inspect, accept, and pay for at the rate of \$1.78 per pair, such of the puttees as, upon such inspection, actually contain not more than 15 per cent of cotton; provided, however, that from any moneys to be paid to the claimant under this decision there shall be deducted the extra cost of inspection over that which would have been incurred by the Government had performance been accomplished within the time originally fixed therefor.

DISPOSITION.

1. This Board will cause the amount due to the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division, and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Smith concurring.

Case No. 733.

In re CLAIM OF HARRY E. LAZARUS.

1. **TERMINATION OF CONTRACT.**—Where claimant's contract was cancelled by order of the Secretary of War because claimant and some of his employees had been indicted for alleged fraud in connection with the contract, which cancellation was followed by an order commandeering claimant's existing supplies accumulated under the contract, the contract was terminated even though claimant and his employees were subsequently found "not guilty."
2. **JURISDICTION—PROXY-SIGNED CONTRACT.**—The Secretary of War has jurisdiction under the act of March 2, 1918, to adjust a proxy-signed contract, even after such contract has been terminated.
3. **CLAIM AND DECISION.**—Petition under G. O. 103 arising out of a proxy-signed contract for raincoats. The only question involved is that of the jurisdiction of the Secretary of War. Held, the Secretary of War has jurisdiction.

Mr. Harding writing the opinion of the Board.

This case is presented in accordance with G. O. No. 103, War Department, 1918, and is for (amount not stated) under the following circumstances:

FINDINGS OF FACT.

1. On the 24th day of October, 1917, the claimant, Harry E. Lazarus, of New York, N. Y., entered into a contract, No. 1542, with the United States through M. Gray Zalinski, Colonel, Quartermaster Corps, United States Army, an officer acting under the authority, direction, or instruction of the Secretary of War. The contract by its terms expired the 31st day of December, 1918. The contract is a formal contract, proxy signed by Captain V. Stone, Q. M. U. R. S., and provides that between the dates of October 24, 1917, and December 31, 1918, the contractor shall furnish and deliver to the depot quartermaster, United States Army, New York, N. Y., approximately 300,000 slickers at \$4.10 each, as per specifications, at a price and sizes fixed. Delivery of 37,500 slickers was to be made monthly, commencing during May, so as to complete delivery during December, 1918. One supplemental contract was subsequently entered into between the contractor and the Government modifying in some respects the terms of the original contract, but it need not be considered here. The contractor entered upon the performance of his contract.

2. On August 9, 1918, the Secretary of War addressed a memorandum to the Acting Quartermaster General directing a cancellation of the contract, which is as follows:

"WAR DEPARTMENT,
Wash., D. C., August 9, 1918.

MEMORANDUM FOR THE ACTING QUARTERMASTER GENERAL.

Subject: Raincoat Frauds.

With regard to your memorandum of August 3, relative to raincoat frauds. I direct that the following action be taken.

1. Cancel immediately all contracts now outstanding for raincoats, with the firms, companies, corporations, and individuals, who or whose representatives have been indicted in connection with alleged fraud, bribery, or corruption with regard to the selling of raincoats to the War Department.

2. Commandeer in the hands of all such persons whose contracts are canceled their existing supplies of raw materials, partly manufactured materials, and completed raincoats.

3. Inspect all raincoats so commandeered, put into stock those which are up to specification, and those which are rejected hold on account of the contractor from whom they were taken.

4. Proceed, either by commandeering and operating factories whose contracts are canceled as above set forth, or by letting new contracts to companies and individuals not involved in these frauds, to increase the supply of raincoats until the needed supply is obtained.

NEWTON D. BAKER,
Secretary of War."

and on August 20, 1918, a cancellation by direction of the Secretary of War was sent to the claimant in the following terms:

["Clothing and Equipage Division. Address reply to 106 East 16th Street, New York City.]

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY.
New York City, August 20, 1918.

In answer refer to File No. CE-A.

From: Acting Quartermaster General, C. & E. Division.

To: H. E. Lazarus, 307 6th Avenue, New York City.

Subject: Raincoat Contract No. 1542, dated October 24, 1917.

This is to notify you that your contract No. 1542, dated October 24, 1917, with the C. & E. Division of the Quartermaster's Corps, for the manufacture of raincoats, is hereby canceled and terminated in accordance with the direction of the Secretary of War.

CONTRACTING BRANCH,
By S. W. SHAFFER,
Captain, Q. M. C.

BEO.

The claimant thereupon, on November 23, 1918, addressed a letter to the Acting Quartermaster General in the following terms:

“NOVEMBER 23, 1918.

WAR DEPARTMENT, QUARTERMASTER GENERAL OF THE ARMY,
Washington, D. C.

GENTLEMEN: Your attention is directed to contract No. 1542, dated Oct. 24, 1917, under which I undertook to manufacture and furnish for your department 300,000 slickers, and to letter of August 20, 1918, signed by Capt. S. W. Shaffer cancelling same by direction of Secretary of War.

During the interval between the awarding of the contract and the cancellation of the same I obligated myself for the purchase of materials and supplies necessary for the manufacture of these slickers, and the cancellation by your department has left me in the position of having a large quantity of these materials and supplies on hand, or under contract, for which I find no present application.

Will you please advise me by return mail what adjustments or system of adjustments your department has adopted which are applicable to this situation.

Needless to say, I am, and at all times have been, ready, able, and willing fully to carry out and perform my obligations under the contract, and for that reason look to your department to see that, in view of the cancellation, some proper adjustment is made to meet the unexpected situation thereby created.

Very truly yours,

H. E. LAZARUS.

HEL/AZ.

3. It appears that the above cancellation and termination, or attempted cancellation and termination, of the contract mentioned in item 1, findings of fact, was caused by the fact that the contractor and some of his subordinates and employees had been indicted for frauds and were held to trial in the District Court of the United States for the Eastern District of New York; that the case was tried and on the 8th day of November, 1918, there was rendered a verdict of “not guilty” as to each and every defendant, and the defendants were discharged.

4. It appears also that the order of the Secretary of War contained in item 2 of his memorandum to the Quartermaster General dated August 9, 1918 (findings of fact 2), directing the commandeering of the existing supplies, raw materials, partly manufactured materials and completed raincoats was carried into effect by compulsory order—under authority of the act of Congress approved June 3, 1916, and with special reference to section 120 thereof, the compulsory order being dated August 27, 1918.

5. On June 26, 1919, the claimant filed his petition with this Board asking that a fair and equitable adjustment of its claim be made and that he be allowed and paid the amount found equitably due him on account of the cancellation of the contract. The precise amount claimed is not stated in the petition.

The only question considered by us is whether or not under the state of facts, the Secretary of War, or this Board, has jurisdiction to grant the relief asked.

DECISION.

1. This case comes to us only for the purpose of determining whether or not the contract referred to in item 1, findings of fact, was terminated, and also whether or not this Board has jurisdiction of the claim presented for adjustment.

By direction of the Secretary of War a notice of cancellation and termination in unequivocal terms was sent to the claimant on August 20, 1918, which notice is set out in full in findings of fact (item 2). The claimant acknowledged receipt of the notice on November 23, 1918. The claimant, however, proceeded no further. The cancellation and termination of the contract was emphasized by the direction of the Secretary of War to the Acting Quartermaster General dated August 9, 1918, directing the commandeering in the hands of the claimant of raw materials, partly manufactured materials, and completed raincoats on hand, and by a compulsory order which was issued under such direction on August 27, 1918 (act of Congress approved June 3, 1916, sec. 120); the claimant contractor accepted the compulsory order and also did not offer or attempt to proceed under the contract.

We hold that the action of the parties as above set forth terminated the contract.

2. The Secretary of War under the act of March 2, 1919, has jurisdiction to adjust the claim presented, for the reason that the contract described (item 1, findings of fact) is a proxy-signed contract and therefore not executed according to law. (Opinion of the Comptroller, Nov. 25, 1918.) The petition filed should be amended, or considered amended, for the purpose of adjustment under the act in question.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Office of Director of Purchase, for appropriate action.

Col. Delafield and Mr. Hamilton concurring.

Case No. 2360.

In re CLAIM OF THE ENGEL AIRCRAFT CO.

1. **SUSPENSION—ANTICIPATORY BREACH—JURISDICTION.**—Where the Government notifies claimant that its formal contract is cancelled, and the contract contains no cancellation clause, and claimant does not accept cancellation, but insists repeatedly that the contract should not be cancelled, the contract is still in existence to the extent that the Secretary of War still has jurisdiction to enter into a settlement contract.
2. **CLAIM AND DECISION.**—Claim is made for \$13,116.33 on a formally executed contract, being appealed to this Board from the Claims Board of the Air Service. Held, claimant is entitled to recover.

Mr. Shirk writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board of the Air Service on a claim for \$13,116.33 on a formally executed contract under the circumstances hereinafter stated.

2. Under date of July 19, 1918, the claimant and the United States through the Bureau of Aircraft Production, acting by First Lieut. F. D. Schanke, contracting officer, entered into contract No. 4315 executed in the manner prescribed by law. That contract provides that for a total consideration of \$40,000 the claimant would furnish to the Government the articles and materials described on order No. 720060, dated July 16, 1918, and thereto attached and made a part of the contract, namely 10 JN-4D airplanes, including certain instruments listed in said order; the same to be ready for inspection at the factory by January 1, 1919.

3. That contract contains the following provisions:

“ART. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the Government may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the

contract price and the cost to the Government of having the articles or equipment complete; (d) or may permit the said contractor to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as and if provided in the attached order."

It contains no other provision about cancellation, rescission, or termination, or time for performance.

4. Maj. Carl B. Ely, A. S., A. P. N. A., of the Plane Production Department, wrote an intradepartmental communication dated August 28, 1918, as follows:

"Subject: Engle Aircraft Company order covering JN-D4 planes.

"1. It is not our intention to give the Engle Aircraft Company an additional order for finished JN-4D planes and it is therefore requested that you cancel the above order with them.

"2. For your information we are not prepared to give these people any additional orders until they make a better showing on their present order for DH-4 spares, and it is the intention at this time that if they are in shape to take new orders they will be kept in production of DH-4 spares."

5. On September 3, 1918, the contracting officer, Lieut. (then Capt.) Schancke, wrote claimant as follows:

"1. Order No. 720060 calling for ten JN 4D planes is hereby cancelled on account of your inability to make a satisfactory showing on production and on account of this order interfering with your production of DeHaviland 4 spare parts."

6. On September 6, claimant replied as follows:

"1. This will acknowledge receipt of your letter of September 3d, regarding cancellation of Order No. 720060, calling for ten (10) JN4D planes.

"2. According to contract we have until January 1st to deliver these planes, and this contract will not in any way interfere with the de Haviland spare parts.

"3. We have contracted for all the parts necessary for these ten JN4 planes, and have received the bulk of the material from our subcontractors, and, inasmuch as we have contracted and are liable for all this, we can not accept cancellation of this order.

"4. After the 15th of this month our mill will be without anything to do as far as DH-4 spare parts contract is concerned, at which time we will finish the wood parts on the orders for JN4D spares and completes."

7. On September 7 the Bureau of Aircraft Production wrote claimant:

"1. This will acknowledge receipt of your letter of September 6th, 1918, relative to the cancellation of Order No. 720060 for ten (10) JN4D planes. In this letter you state that you contracted for all necessary parts for these planes and have received the bulk of materials.

"2. This office is advised that the order was given you upon a distinct understanding made with Mr. Kellogg and Capt. Grant, that

you should not go ahead with the production of these planes until you had been given a larger order. This small order for ten (10) planes was placed with you in order that you should tool up in anticipation of future orders.

"3. In view of this fact, this office feels that you should be willing to accept cancellation of the said order."

8. On September 10, Maj. Ely, of the Production Division, wrote an intradepartmental communication to the Procurement Division as follows:

"Subject: Cancellation of 10 JN-4D airplanes with Engle Aircraft Company.

"1. Referring to your memorandum of even date, copy attached, beg to advise that we are strongly in favor of the cancellation of the contract with the Engle Aircraft Company covering 10 JN-4D airplanes. This order was given to the Engle Aircraft Company with the distinct understanding that they were not to go ahead with the same until they procured a substantial order of the same type planes which it was contemplated they would receive.

"2. In view of the necessity of keeping in production those airplane factories which are now making JN-4D planes, it is thought advisable not to put a new plant into production on this type. Further, the Engle Aircraft Company have not shown up to this time ability to handle finished planes, and we can not recommend placing any such orders with them now."

"9. On September 19, 1918, the claimant wrote the Procurement Division as follows:

"1. This will acknowledge receipt of your letter dated the 7th. We wish to call your attention to the fact that this was mailed from Washington on the 17th and received here on the date of this acknowledgment.

"2. At the time we received order No. 720060 we were also in receipt of an order for JN-4D spares, and, owing to past delays in getting in our metal parts, we immediately placed orders covering these, which did not in any way interfere with the present DH contracts.

"3. When you gave us this order for ten complete JN-4D's we were at a loss to understand why you did not give us an order sufficient for good manufacturing practice, and, at the time, Mr. Sayle explained this particular lot of ten completes would be unprofitable. However, we accepted the order under these conditions.

"4. We wish to call your attention to this transaction as a whole. On June 25th when our Mr. Sayle was in Washington, you released to him an order for the following items:

A. 10 JN4D planes.....	40,000.00
B. 100 sets spare parts as per list released to us at prices extended.....	391,770.00
C. Number of miscellaneous parts per list released to us.....	83,582.50

Total.....	515,352.50
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"5. As our principal orders for fabricated parts for the DH had been let at this date, we immediately turned this order over to our Purchasing Department and also increased our force in order to place the necessary metal parts for this order in its entirety, as the principal holdup in production is the getting in of the metal parts.

"6. On June 28th you wired us to hold order for ten JN-4D planes in abeyance until further advised, which we acknowledged immediately, advising that we had stopped work on these ten JN-4D completes as per your instructions.

"7. On June 29th you wired us referring to your telegram of the day before, calling our attention to hold the order for the JN-4D planes in abeyance, and at the same time, instructing as to also hold the new order for JN-4D spares and sets of parts in abeyance until further advised.

"8. On July 1st you again wired us referring to the ten JN-4D planes, and asked us if we could complete these by January 1st. In reply Mr. Sayle went to Washington, and, after discussing the matter with the Aircraft Production Board, wrote a letter for the attention of Mr. J. Gilmore Fletcher, Chief of Aircraft Purchases, in which we stated that we could complete ten JN-4D planes before January 1st.

"9. At the same time you changed these two orders, the total amount of which was one-third of the original order placed with us. These orders are Nos. 720060 for ten JN-4B's complete, and DO-720059 got JN-4D spares.

"10. You can readily appreciate the difference between the original order and the ones finally decided on caused us considerable trouble and expenses; in some cases our subcontractors refused to cancel part of their order."

11. We have repeatedly called your attention to the necessity of releasing orders to us in sufficient quantity and in time to avoid a lapse in production.

12. On the 10th of August your office called your Cleveland Branch Office and requested that a representative from our company arrange to be in Washington to meet Major Ely on Monday morning for the purpose of releasing to us additional orders for JN-4D. Accordingly the writer reached Washington on Monday morning and met Major Ely, and contrary to the facts and the purpose for which we were requested to call, we were advised that there were no orders being released.

13. We wish to avoid going through any and all unnecessary procedure of this kind. And we are particularly anxious to avoid any unnecessary delays in production.

14. Mr. Sayle and the writer will come to Washington in the very near future to take up these various matters, and, under the present conditions we can not accept the cancellation as requested."

10. On October 18, 1918, the Bureau of Aircraft Production replied:

"1. This will acknowledge receipt of your letter of September 19, 1918, relating to the proposed cancellation of Order #720060, calling for ten JN-4D Planes. This letter has not been answered sooner, because of the conferences which have been held here in Washington between your President and various representatives of this Bureau.

2. As you have been advised by Mr. J. G. Gletcher, Chief of the Procurement Division, this Bureau desires to cancel this contract and requests that you submit a statement outlining a proposed basis for cancellation."

11. Thereafter negotiations looking toward a settlement were had and a formal settlement contract dated October 29, 1919, was drawn up and signed by both parties. By this settlement contract the claimant agreed to settle for the sum of \$13,116.33. Article V of that contract provided that it should not become a valid and binding obligation of the Government unless and until the approval of the Claims Board of the Air Service had been noted at the end thereof.

12. The Claims Board of the Air Service refused to note its approval at the end thereof, on the theory apparently (on a recommendation made to it by Lieut. Abel) that the notice of cancellation served by the Government amounted to a breach of the contract by the Government; that that breach ended the existence of the contract and that consequently the Secretary of War, his contracting officers and that Board as his agent, had lost their power to enter into an amendatory contract settling a contract which no longer existed and that claimant's only remedy was before a court of competent jurisdiction. The minutes of the Claims Board of the Air Service of its meeting of December 8, 1919, recite:

"This claim was reported by Lieut. Abel and the following motion was adopted: That this claim be disallowed for the reason that it appears from the evidence before the Board that contractor incurred the expenses alleged to be due without authority from and against the specific warning of officers in charge of production, and that contracting officer appears to have subsequently cancelled the contract for the specific reason that said contract interfered with the production of other contracts given to this claimant, therefore the contractor by failure to continue production under the contract is now barred from the settlement with the Secretary of War and must prosecute any claim he may have in a court or competent jurisdiction."

13. That action of the Claims Board left the claimant without a settlement and it has appealed to this Board.

DECISION.

1. Clearly contract No. 4315 was a valid and binding obligation of the Government to accept and pay for the articles mentioned. It also bound the claimant to manufacture and furnish said articles according to the contract. The claimant was engaged in the performance of that contract. It was required to have the articles ready for inspection on January 1, 1919. Clearly it could not be in default in performance before that time. There was no ground for a rescission of the contract under the provision above quoted.

2. The claimant consistently refused to agree to the attempted cancellation. It can not be held therefore that there was an *agreement*, a new contract, to cancel.

3. The question remains whether the attempted cancellation amounted to an anticipatory breach of the contract by the Government. Although the doctrine of anticipatory breach promulgated by the leading case of *Hochster v. De la Tour* (2 El. & Bl., 678), has not been followed in a few of the States of the Union, it is recognized by the weight of authority in this country (13 Corpus Juris, 651) and by the United States Supreme Court (*Roehn v. Horst*, 178, U. S. 1).

4. If we consider the Government's notice of cancellation as an unqualified repudiation and refusal to go on with the contract and a renunciation of its further existence, such act undoubtedly amounted to an anticipatory breach. But, in that event, the claimant had its election to ignore the breach and to treat the contract as still in existence (*New Brunswick and Canada R. Co. v. Wheeler & Co.*, 12 Fed., 377; affirmed 115 U. S., 29; Elliott on Contracts, sec. 2033). The claimant, by its assertions and remonstrances, did elect, we think, to consider the contract as still in existence. In those circumstances it was the claimant's duty not to go on and complete performance because that would have been unnecessarily increasing the damage to the United States (13 Corpus Juris, 655-656; Elliott on Contracts, sec. 2035; Sedgwick on Damages, sec. 636 c.). The claimant acted very properly, therefore, when it did not continue with performance after it received the notice of cancellation.

5. Our conclusion is that the notice of cancellation and subsequent acts of the parties did not put an end to the existence of the contract and that consequently the Secretary of War and his agents have not been divested of their power to enter into an amendatory contract of settlement. The Claims Board of the Air Service is so informed and is hereby advised to enter into a settlement contract with the claimant.

Col. Delafield and Lieut. Col. Williams concurring.

Case No. 1895.

In re CLAIM OF THE J. G. WHITE ENGINEERING CO.

1. **IMPLIED CONTRACT.**—Where claimant made a written contract with the Government to construct an embarkation camp, and it was agreed that claimant would be paid for its services certain allowances and percentages of the cost of the work, the amount in no event to exceed a certain sum, and afterwards the construction officer in charge ordered claimant to make additions to, changes in, and enlargements of the construction, which were not within the purview of the original contract, and claimant complied with the order, there resulted an implied contract, within the provisions of the act of March 2, 1919, to compensate claimant for its services in doing said additional work, although such compensation might exceed the maximum amount allowed by the original contract.
2. **SAME—BASIS OF COMPENSATION.**—Where said implied contract did not express the manner of paying and the amount of claimant's compensation, and said additional work was of the general character as that done under the original contract, and was performed under the instructions of the construction officer, and in accordance with the maps, plans, and specifications described in the original contract, it will be implied that the parties agreed, as a part of said implied contract, that claimant was to be compensated in the same manner and upon the same basis as provided in the original contract, for performing the same.
3. **VOID SUPPLEMENTAL CONTRACT.**—Where, after the termination of the original contract for the construction of a camp, claimant and the Government officer made a supplemental contract in order to provide payment to claimant for the rendition of services in addition to those provided for in the original contract, and where said supplemental contract purported to amend the original contract by increasing the maximum total amount which claimant might receive under the original contract, and it was so recited in the supplemental contract, said supplemental contract is void for the reason (1) that the said additional work was not within the purview of the original contract and (2) because of the recitals to the effect that as to such work the contracting officer had a right to call for the same under the original contract.
4. **CLAIM AND DECISION.**—Claim is made under the act of March 2, as class B, and is founded upon an implied contract alleged to have been made about February, 1918. The claim is for services rendered in constructing an Army camp, which services were in addition to those provided for under the original contract. Held, That claimant is entitled to relief. Held further, That the amount to be awarded claimant shall be ascertained by adding the cost of the additional work to the cost of the work done under the original contract, and applying to this total the appropriate percentage from the schedule of percentages in the original contract, and this percentage then applied to the cost of the additional work, subject to any provisions of the original contract with respect to

the modification of such percentage. The Board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C, to the Claims Board, Air Service, for action under subdivision C, Section V, Supply Circular No. 17.

Mr. Williams writing the opinion of the Board.

FINDING OF FACTS.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$18,900 by reason of an agreement alleged to have been entered into between the claimant and the United States. This case grows out of the following facts and circumstances:

1. Under date of September 10, 1917, the petitioner, the J. G. White Engineering Co., entered into a formal contract (Ord. No. 50002) with the United States (by Lieut. Col. C. G. Edgar, Signal Corps, contracting officer) by which, among other things it was provided as follows (the typewritten portions of the printed contract appearing in italics):

ARTICLE I.

EXTENT OF THE WORK.—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

For the construction of a Concentration Camp in the vicinity of Newport News, Va., including clearing, grading, drainage, sewerage, water supply, electrical distribution, railroads and sidings, 24 warehouses, 27 mess halls, 27 barracks, 2 officers' quarters, 1 administration building, 1 garage, 1 commanding officer's quarters, and 1 guardhouse, all as indicated on drawing Job 809, sheet 87, prepared by Mr. Albert Kahn, dated Sept. 1, 1917,

in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction.

The contracting officer may, from time to time, by written instructions or drawings issued to the contractor, make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings.

* * * * *

ARTICLE III.

DETERMINATION OF FEE.—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

If the cost of the work is under \$100,000.00 a fee of ten per cent (10%) of such cost.

If the cost of the work is over \$100,000.00 and under \$125,000.00 a fee of \$10,000.00.

If the cost of the work is over \$125,000.00 and under \$250,000.00 a fee of eight per cent (8%) of such cost.

If the cost of the work is over \$250,000.00 and under \$266,666.67 a fee of \$20,000.00.

If the cost of the work is over \$266,666.67 and under \$500,000.00 a fee of seven and one-half per cent (7½%) of such cost.

If the cost of the work is over \$500,000.00 and under \$535,714.29 a fee of \$37,500.00.

If the cost of the work is over \$535,714.29 and under \$3,000,000.00 a fee of seven per cent (7%) of such cost.

If the cost of the work is over \$3,000,000.00 and under \$3,500,000.00 a fee of \$210,000.00.

If the cost of the work is over \$3,500,000.00 a fee of six per cent (6%) of such cost.

Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (b) above, shall in each of the above contingencies be five per cent (5%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the contracting officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the contracting officer may determine.

The total fee of the contractor hereunder shall in no event exceed the sum of \$105,000.00, anything in this agreement to the contrary notwithstanding.

2. In addition to the above-quoted provisions, the written contract also contains detailed provisions in respect to the "cost of the work," "payments," "inspection and audit," and "special requirements," and other detailed provisions which, if not absolutely essential, were reasonably necessary provisions to govern the rights and conduct of the parties in the performance of work of the nature and character of that contemplated under the cost-plus system of construction adopted by the Government in respect to work of the sort contemplated and carried on.

3. In due time the petitioner began upon the work under the written contract, and when this work was well on the way to completion.

the enlargement of the embarkation program for troops, as well as new regulations with respect to the sanitation, health, and comfort of the men, made it apparent to Government officers in charge of such construction work that much larger facilities were necessary at the site of this work than those embraced in, or contemplated under, the written contract of September 10, 1917, so that before petitioner had completed the work contemplated and embraced in the written contract, the following work is alleged to have been done by the petitioner with the same force and organization performing the work under the original contract, which work, it is alleged, was done under orders received from the Construction Division of the Signal Corps, and which it is also alleged was new and additional work not contemplated or embraced under the terms of the written contract:

Buildings:		
Item 1.	Hospital -----	\$92,986.28
2.	Incinerator -----	6,172.53
3.	Post office -----	5,141.83
4.	Post exchange -----	745.41
5.	Barracks reconstruction (increasing size of all barracks) -----	58,386.84
6.	Converting storehouses (this work in connection with changing 12 storehouses into barracks to increase capacity of camp) -----	12,003.42
7.	Electrical (interior) -----	4,969.16
	(This is to cover the electrical installation in extra buildings above.)	
8.	Septic tank No. 2 -----	10,439.63
	(Additional tank authorized April 16, 1918.)	
9.	Railroads -----	6,156.77
	(Cover cost of 1,330 lin. ft. of track at east end in connection with incinerator and main-line connection.)	
10.	Roads -----	14,679.05
	(This covers cost of the following additional road work):	
	35,200 sq. ft. of road, including—	
	Road "D" -----	25,600
	Incinerator road -----	7,200
	Hospital road -----	11,200
		44,000
	Deduct road to commander's house--	8,800
	Total extra road-----	35,200
11.	Water system -----	3,514.48
	(Laying temporary laterals to all mess halls, barracks for soldiers' use before permanent connection could be installed):	
	Post office-----	feet 100
	Hospital -----	do 300
	12 warehouses -----	do 300
	Guardhouse -----	do 100
	Also permanent lines to—	
	Incinerator -----	do 200
	Septic tank -----	do 100
	(Frost casing on warehouse sprinkler riser pipes and changing frost casing on riser pipes from 2-ply to 3-ply covering.)	

12. Sewer system -----	\$38,163.40
Line to incinerator 600 feet 6-inch line, 1,556 feet 12-inch line.	
Line to rear barracks 1,945 feet 10-inch line, 389 feet 8-inch line.	
Six extra manholes in river lines. Installing 2 extra pumps at septic tank—6-inch centrifugal and 4-inch diaphragm. Putting check valves in old septic tank. 715 l. f. 6-inch tile subdrain laid under the 12-inch line and covered with crushed stone 2 by 1 inch—1,882 l. f. 18-inch storm sewer line—2 ditches, 4,300 l. f. each.	
13. Fences -----	860.90
(Covers material cost only. Labor performed by soldiers.)	
14. Maintenance -----	15,444.56
(The items of maintenance are numerous, principally because we were called upon to furnish materials and labor, making repairs and changes to buildings occupied by the soldiers. It was necessary to renew door and window glass; replace burnt-out grates. On account of the severity of the winter there was considerable trouble with frozen water pipes. This necessitated a considerable maintenance cost in excavating and thawing frozen pipes and repairing broken ones.)	
Changing all roof ventilators in barracks, mess halls, commissioned officers' quarters, commander's house, guard house, and administration building and general repairs to buildings. Another considerable maintenance cost was in connection with keeping the original sewerage system in operation until its capacity had been increased by an additional line to provide for the increased population of the camp.	
The number of men in camp was practically doubled as compared with the original plans and half the warehouses were converted into barracks, necessitating additional sewerage capacity.	

 269,724.26

4. There was no express agreement or understanding between the officers of the Construction Division of the Signal Corps and the petitioner with respect to the method of the *execution* of this new and additional work, but the work was done under the direction and supervision of the Government construction officer on the job, and was handled in all respects by the Construction Division and by the contractor in the same manner as work done under all the terms, conditions and restrictions mentioned in the written contract of September 10, 1917; nor was there any express understanding or agreement between officers of the Construction Division of the Signal Corps and the petitioner as to the amount of the fee to be charged for the alleged new and additional work, but the conduct both of the petitioner and of the Government officers ordering the new and additional work, very clearly indicate that with respect to the matter of fee also, the new and additional work was regarded as a part and parcel of the total work to be done at Morrison Field, the fee for all of which was to be determined and fixed according to the sliding scale of amounts and percentages for the determination of fee, and other provisions with respect to the determination of fee, mentioned and embraced in the written contract of September 10, 1917.

5. Under date of January 10, 1919, petitioner and the United States (by Clinton C. Brown, Captain, U. S. A., contracting officer) entered into a so-called "supplemental contract" which recited the contract of September 10, 1917, and further recited that:

"Whereas, Article 1 of the aforesaid contract of September 10, 1917, provided that the contracting officer could from time to time make changes in the drawings and specifications, issue additional instructions, require additional work to be done, or direct the omission of work previously ordered, all of which changes, modifications, and additions should be covered by the provisions of the aforesaid contract the same as if they were embodied in the original drawings and specifications, and

"Whereas, the contracting officer in the aforesaid contract, or his successors, has issued written instructions and drawings to the contractor requiring additional work, which has increased the cost of such construction work by the amount of approximately two hundred sixty-nine thousand seven hundred twenty-four and 26/100 dollars (269,724.26), and

"Whereas, in view of the aforesaid additions which have increased the cost of the said construction work, it is the desire of the parties to increase the aforesaid maximum total fee which can be paid to said contractor under said agreement from the sum of one hundred five thousand dollars (105,000) to the sum of one hundred twenty-three thousand nine hundred dollars (\$123,900).

"Now, therefore, this contract witnesseth: That in consideration of the premises and the covenants and conditions hereinafter set forth, the contractor and the contracting officer hereby agree as follows:

ARTICLE I.

"It is hereby mutually agreed by and between the parties hereto that the last paragraph of Article III of the aforesaid contract of September 10, 1917, shall be amended to read as follows: 'The total fee of the contractor hereunder, shall in no event, exceed the sum of one hundred twenty-three thousand nine hundred dollars (\$123,900), anything in this agreement to the contrary notwithstanding.'

ARTICLE II.

"The parties hereto mutually covenant and agree that this contract shall be supplemental to the aforesaid contract of September 10, 1917, to the same extent as if the above amendment had been specifically written into said contract when originally made, but that otherwise all covenants, agreements, terms, and conditions thereof shall be in full force and effect."

6. The so-called "supplemental contract" contains also other suitable provisions which are not necessary to be set out here.

7. The C. & H. Lumber Co. (Inc.), of Newport News, Va., has filed a claim in this case, alleging that it was a subcontractor of the petitioner and setting up a claim for material furnished.

DECISION.

A.—*Was the work mentioned in paragraph 3 of the statement of facts hereto attached work which the contracting officer had a right to require under the terms of the contract of September 10, 1917.*

1. The contract of September 10, 1917, between petitioner and the Government of the United States is not before this Board for the determination of any of the rights of the parties thereunder, but that contract is here presented merely in an incidental way for the purpose of determining whether or not the alleged additional work done by the contractor at Morrison Field was such work as the contracting officer had a right to require under the terms of that contract. The contract of September 10, 1917, calls for the following lay-out of buildings and work:

“clearing, grading, drainage, sewerage, water supply, electrical distribution, railroads and sidings, 24 warehouses, 27 mess halls, 27 barracks, 2 officers’ quarters, 1 administration building, 1 garage, 1 commanding officer’s quarters, and 1 guard house, all as indicated on drawing Job 809, sheet 87, prepared by Mr. Albert Kahn, dated Sept. 1, 1917.

This contract also contains the provision that—

“The contracting officer may, from time to time, by written instructions or drawings issued to the contractor, *make changes in said drawings and specifications*, issue additional instructions, *require additional work*, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications and additions with the same effect as if they were embodied in the original drawings and specifications.”

The question then presented is: To what extent could the contracting officer, under the terms of the written contract, *make changes in the drawings and specifications*, or *require additional work*.

2. In this case it is true that the Government was paying all costs of labor and materials, and the only interest that petitioner had in the work was the fee which it was to receive, based in the main upon a sliding scale of allowances and percentages to be determined by the cost of the work, but subject to a clause limiting the amount of possible fees to \$105,000, irrespective of the cost of the work that could be called for under the written contract. The original contract was made upon estimates of the cost of the work, and the presumption must be indulged that petitioner agreed to the insertion of the clause limiting the possible fee after consideration of the question as to whether or not the work contemplated under the contract would approach near enough to the estimated cost to allow

reasonable compensation for the work undertaken. In these circumstances this Board is of the opinion that, with respect to the right of the contracting officer to call for changes in plans and specifications, and for additional work, the situation of the petitioner was analogous to that of an independent contractor under a contract in which he was to furnish and pay for the labor and materials and receive a unit price for the completed work. In respect to the latter cases the law is well settled that, where plans and specifications are specifically made a part of the original contract for construction work and there is a provision authorizing the party having the work done to call for changes in the plans and specifications, such party has a right to call only for such changes as may be necessary and incidental to the completion of the work in accordance with the general plan (4 Elliott on Contracts, sec. 3675; 9 Corpus Juris 718-722; C., C., C. & St. L. Ry. v. Moore, 82 N. E. (Ind.) 52). This doctrine having its foundation in common sense and right, may be applied with equal force to the provision in the contract which authorizes the contracting officer to call for additional work. The plans for Government construction work were not drawn up in the first instance to conform to particular fields, but they were general plans to be adopted and used in the construction of units of various sorts throughout the United States. There were, therefore, differences of contour which had to be accounted for in the actual work to be done in pursuance of these plans depending upon the situation of the field. It is clear that the provision giving the contracting officer the right to call for additional work was intended only to embrace such incidental and necessary work as might be found essential to the completion of the work in accordance with the general plan. The fee in these cases was based upon an estimated cost of the work mentioned and contemplated under the written contract, and any construction of the written contract which would authorize the contracting officer to call for new work or additional work involving a radical departure from the plans and specifications which were made a part of the agreement, would involve an additional undertaking beyond that contemplated by either party at the time of the execution of the written agreement.

B.—How must the above principle be applied to the facts and allegations of this case?

3. It is very clear, in applying the general principle and common sense rule above announced, and in construing the provisions of the written contract governing the parties in the execution of all work at Morrison Field, that the contracting officer had no right under the terms of the written contract to call for additional buildings; or sub-

stantial additions to buildings already completed or partially completed by the petitioner in accordance with the original plans and specifications; or the conversion or rebuilding of any buildings which were completed or partially completed according to the plans and specifications where such rebuilding or conversion was not occasioned by the fault of the contractor; or the building, erection, or construction of necessary electrical equipment, railroads, roads, waterways, sewers, or fencing, occasioned by the erection of such additional buildings not embraced in the plans and specifications under the original contract, or the rebuilding or conversion of buildings completed or partially completed according to the plans and specifications where such rebuilding or conversion was not occasioned by the fault of the contractor; nor for the maintenance of buildings already constructed under the terms of the written contract or under any agreement independent of the written contract; where such additional work embraces additional cost not to be compensated for under any provision of the written contract.

C.—The contract for the additional work; its terms.

4. In respect to all additional work, which the contracting officer had no right to call for under the terms of the written contract of December 10, 1917, as hereinbefore limited and defined, which was done by the petitioner at Morrison Field, upon orders received from the Construction Division of the Signal Corps, or which was accepted on behalf of the United States, there was a contract entered into and implied from the facts and circumstances of the case, between the petitioner and the Government of the United States, which contract comes within the purview of the act of March 2, 1919. It is apparent that it was understood between the parties that, in the *execution* of such additional work, the rights of the petitioner and the Government should be determined by provisions identical with those contained in the written contract of September 10, 1917; and it is apparent also that it was understood by the parties that the fee to be allowed for the additional work was to be ascertained by applying provisions identical with the scale of percentages and allowances contained in the contract of September 10, 1917, for the total work done at Morrison Field, but not as to such additional work subject to any clause limiting the possible fee; so that, in ascertaining any fee to be allowed for the additional work (the contractor being settled with for work done under the original contract and strictly in conformity with the terms thereof), the cost of such additional work should be added to the cost of the work done under the original contract and the appropriate percentage ascertained by this total from the schedule of percentages and this percentage applied to the cost of the addi-

tional work subject to any other provision of the contract with respect to the modification of such percentage. There were two reasons, according to Col. Bennington, why it was the intention of the Government officers that the fee for the additional work should be ascertained in this manner:

(a) That to regard the additional work as an entirely separate and distinct undertaking would involve dropping down again to the bottom of the scale of allowances and percentages, thereby giving larger fees to the contractor, whereas this was not contemplated by the parties because the larger allowance or percentage of fees, as related to smaller cost of the work, was occasioned in large part by the fact that the beginning of the work involved the initial assemblage of the contractor's organization, and

(b) That the original work and the additional work were, in many instances, carried on simultaneously and there was a mixture of materials and an interchange of labor between the two jobs which made it practically impossible to separate the costs of the two jobs in order to ascertain the separate fees due therefor.

So far as this case is concerned, there is no difficulty in applying the graduated scale of allowances and percentages, and other provisions of the agreement, to the ascertainment of the fee for the additional work, and this Board will therefore give expression, in the manner above set out, in the ascertainment of the fee for the additional work, to the undisputed intention of the parties in regard to that matter.

D.—The so-called supplemental contract not effective or binding between the parties.

5. This so-called supplemental contract was entered into after all the additional work was completed, and was merely an effort on the part of the Government to make payment of the fee for the additional work. It recites, however, that the additional work for which the additional fee in the supplemental contract is to be paid was such work as the contracting officer had a right to call for under the terms of the original contract. If the contracting officer had a right to call for such additional work under the terms of the written contract of September 10, 1917, then the supplemental contract is null, void, and of no effect, because it is an agreement allowing the petitioner a fee over and above that which is allowed by the limiting clause in the original contract. If the work mentioned in the said supplemental contract is work which the contracting officer had no right to call for under the contract of September 10, 1917, then this supplemental contract is not an instrument upon which petitioner might rely for recovery. This supplemental contract, therefore, must be set aside as having no binding effect upon the parties thereto, and the rights of the parties must be determined in accordance with

the conclusions herein announced as if no such supplemental contract had been entered into.

6. This Board expresses no opinion in respect to the rights of the C. & H. Lumber Co. The rights of this company, so far as the Government is concerned, should be determined by the provisions of the agreements existing between the Government of the United States and petitioner in respect to the work done at Morrison Field, as hereinbefore set out, as no evidence has been introduced to show any liability of the Government to the C. & H. Lumber Co. different from other subcontractors dealing with petitioner under the terms of said agreements.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Shaw concurring.

186107—20—vol. 3—20

Case No. 534.

In re CLAIM OF ALEXANDER PROPPER & CO.

1. **OVERAGE.**—Where claimant had a proxy-signed written contract for 300,000 pairs of puttees which was suspended when 86 1-2 per cent performed, and an award of \$54,000 was made and accepted, and the customary full release given to the Government, claimant can not afterwards recover for 10 per cent overage, no mention of overage being made in the contract, on the theory that there had been delivered and the Government had accepted and paid for 10 per cent overage on previous contracts.
2. **CONTEMPORANEOUS ORAL STATEMENTS.**—In such a case, neither can claimant recover by reason of any statements made by the contracting officer at the time of negotiations to the effect that the Government would accept 10 per cent overage, for the reason that such negotiations merged into the written contract.
3. **MISINFORMED AT THE TIME OF SETTLEMENT.**—Nor in such a case can claimant recover on the theory that at the time it made settlement of its written contract and executed a full release, claimant was informed that it was not thereby waiving its right to claim overage, it being clearly established that the officers of the Government negotiating the settlement did not so inform claimant.
4. **CLAIM AND DECISION.**—Claim was filed with the local claims board of New York for \$61,425 for overage on a proxy-signed written contract for puttees, which claim was denied and appealed to this Board. Held, the decision of the lower board is affirmed.

Mr. Harding writing the opinion of the Board.

This case comes to us on appeal from the Claims Board, Office of Director of Purchase, on a claim for \$61,425, on a class A claim, under the following circumstances:

FINDING OF FACT.

1. On April 18, 1918, the claimants, Alexander Propper & Co., of the first part, entered into a contract 2006-N, with the United States of America, of the second part, which was in the shape of a formal contract, proxy signed, made in the name of Col. H. J. Hirsch, Q. M. C., signed by Capt. H. M. Schofield, Q. M. R. C., both being officers acting under the authority and direction of the Secretary of War. The contract was for the delivery from the claimants to the Government of "approximately" 300,000 pairs woolen spiral puttees at different times, at a stipulated price, between the 18th day of April, 1918, and the date of the expiration of the contract, by limita-

tion of time, December 31, 1918. The contract contains the following provision:

"4. That it is mutually agreed and understood between the said parties that the separate quantities of supplies to be delivered under this contract may be increased or decreased, at the option of the United States, at any time or times during the continuance of the contract, not exceeding the percentages thereof indicated in the circular to bidders hereto attached; and if no percentages of increase or decrease are named in the circular to bidders this contract will not be subject to increase or decrease. In case of change in the quantity required by increase or decrease, notice in writing of such change will be served upon the contractor by the contracting officer."

2. It is asserted by the claimants that the negotiations for this contract were conducted by one Harry Simon, agent for and representing the claimant, and by Frederick E. Haight, Q. M. C., a negotiating officer for the purchase of knit goods in the C. & E. Division, representing the Government. And it is also claimed that during these negotiations Mr. Haight said to Mr. Simon that Alexander Propper & Co. were authorized to make over deliveries of not more than 10 per cent of the amount of goods called for by the contract No. 2006-N, and that Mr. Simon subsequently advised Mr. Propper, a member of the copartnership of Alexander Propper & Co., of this conversation.

3. During the performance of this contract, and early in August, 1918, the claimants attempted to deliver to the Government shipments on overdeliveries claimed to have been authorized upon another contract of a similar character which was then being performed and upon which deliveries were being made. The inspector having in charge the inspection of the goods declined to receive the overdeliveries, and thereupon at the request of claimants the said Frederick E. Haight of the Quartermaster General's office at New York City wrote a letter directed to the attention of Lieut. Fuller, an inspector of deliveries to be made under this contract and under a similar one then being performed, as follows:

"Aug. 15th, 1918.

ACTING QUARTERMASTER GENERAL,

New York Depot Quartermaster, New York.

Attention Lieut. Fuller.

1. As per authority granted this office, concerns making puttees are allowed 10 per cent overshipment. This refers to the contracts for Alex. Propper & Co., No. 1878N—No. 2006N.

KNIT GOODS BRANCH.

F. E. HAIGHT.

Per F. E. HAIGHT."

NOTE.—This authority was to allow the 10 per cent overshipment also on contract No. 1878-N as well as on the one in question, that

contract (1878-N) being in process of fulfillment at the same time with the one in question.

Purchases of goods and commitments were made by the claimants for the fulfillment of two similar contracts, one for 266,000 pairs of puttees, and one for 200,000 pairs of puttees, both of which contracts were dated in April, 1918, and were being performed by the claimants contemporaneously with the one in question; and also, they claim, for the fulfillment of this contract, 2006-N; and the claimants testify that no purchases and no commitments were made subsequent to July 2, 1918. The two contracts with which this one was a contemporary were completely performed, and the Government received and paid for on each of them 10 per cent more than the definitive quantity named in the contracts. The contract in question, 2006-N, was suspended before it had been fully performed.

4. On or about December 23, 1918, upon application for a final adjustment of the amount due the claimants on account of the contract in question, the claimants filled out and filed with the Government a questionnaire, a part of which, necessary to the consideration of this case, is as follows:

INVENTORY AND OTHER DATA NECESSARY FOR FINAL ADJUSTMENT OF CONTRACT.

- 1—*a.* Article: Puttees.
b. Contractor's name: A. Propper & Co.
c. Contract number: 2006-N.
d. Completed portion of contract: 86½ per cent.
e. Quantity: 275,472 pr. Value: \$619,812.
f. Contracted quantity: 300,000 and 10 per cent overage. Authority: F. E. Haight, letter, Aug. 17 and 21.
g. Contractor's address: 1134 Fulton Street, Brooklyn, N. Y.
h. Date of contract: April 18, 1918.
i. Uncompleted quantity of contract: 13½ per cent.

24,528	\$55,188
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j. Quantity: 30,000 overage. Value: \$67,500 overage.
2. Quantity delinquent at time operations were suspended on this contract: None.
3. Reason for delinquency (answer in detail): * * *.

Based upon the questionnaire a proposition of settlement or for the termination of the contract 2006-N was made by the claimants to the Government, a copy of which is as follows:

“JUNE 14, 1919.

“In order to effect a settlement with the Government on contract 2006-N for 300,000 woolen spiral puttees, and in view of the fact that we have not supplied ourselves with all the necessary materials to complete the said contract (as more specifically set forth in the questionnaire submitted to the Clothing & Equipment Division), we hereby agree to accept the terms set forth in plan C outlined in a communication from the office of the Quartermaster General to the zone supply officer whereby we are to receive a flat payment of \$0.05 per each item canceled, to wit, 24,528 pairs puttees, amounting to \$1,226.40 plus the following allowances for the material that we have

on hand and purchased solely in connection with the performance of the above-mentioned contract:

7,994½ yds. 54" cloth, at \$3.85 (to become Govt. property), amounting to -----	\$30,779.30
3,233½ yds. 44" cloth, at \$3.21 (to become Government property), amounting to -----	10,380.74
1,713½ yds. 27" cloth, at \$1.68 (to become Govt. property), amounting to -----	2,878.68
1,078½ yds. 54" cloth, at \$3.70 (to become Govt. property), amounting to -----	3,991.83
903 yds. 52" cloth, at \$3.70 (to become Govt. property), amounting to -----	3,343.87
79½ yds. 51" cloth, at \$3.70 (to become Govt. property), amounting to -----	293.69
546 gr. puttee tape, at \$2.85 per gr. (to become Govt. property), amounting to -----	1,556.10
348 sheets corrugated paper, baling material, at \$75.00 M, (to become Government property), amounting to -----	26.10
60 per cent of cost price on 50 lbs. thread, at \$1.30, amounting to -----	39.00

altogether amounting to \$54,515.71 in complete settlement of the above-mentioned contract, and in consideration of the above payment to us of the last-named amount, to wit, \$54,515.71, we hereby waive all claims of whatsoever nature that we may have against the U. S. Government on contract No. 2006-N.

"A. PROPPER & COMPANY,

"By ALEXANDER PROPPER,

"*Mcm. of Firm.*

"F. C. WIGHTMAN, *Capt., Q. M. C.*

"HOWARD M. BLAICKIE, *2d Lt., Q. M. C.*

"*Witnesses.*"

On September 17, 1919, an award was made and approved, which said award is as follows:

AWARD.—FORM 1 (Revised).

C. & E. DIVISION, NEW YORK, ZONE NO. 2.

[THIS FORM TO BE USED WHEN A SINGLE AWARD IS TO BE MADE.]

Order of the Secretary of War under the act of Congress entitled "an act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," approved March 2, 1919.

It appearing to the satisfaction of the Secretary of War that an agreement was entered into in good faith between A. Propper & Company, the claimant, and H. J. Hirsch, Col. Q. M. C., an officer or agent acting under the authority, direction, or instruction of the Secretary of War, on or about the 18th day of April, 1918, during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, for a purpose connected with the prosecution of the war; that the agreement had been performed in whole or in part, or expenditures had been made or obligations incurred by the claimant on the faith of such agreement, prior to November 12, 1918; that the agreement has not been executed

in the manner prescribed by law; that the said agreement is within the provisions of the above-entitled act of Congress; that the nature, terms, and conditions of said agreement are set out in "Form C," Certificate of Claims Board, Office of Director of Purchase, No. PC-3253, dated June 16th, 1919, on file in the War Department; that the claimant presented his claim to the Secretary of War before June 30, 1919; [Block 2] that there have heretofore been delivered by the claimant and accepted by the United States under the said agreement 275.427 prs. woolen spiral puttees, of the fair aggregate value of \$619,812.00; that the said sum of \$619,812.00 paid or to be paid for said articles or work heretofore delivered and accepted, together with the additional sum of \$54,372.52, will adjust, pay, and discharge such agreement upon a fair and equitable basis, and that such sum will not include prospective or possible profits on any part of the agreement beyond the goods and supplies delivered to and accepted by the United States thereunder and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said agreement;

The Secretary of War hereby awards to said claimant the sum of \$54,372.52 [block 3], which sum, in conjunction with the payments hereinabove mentioned, made or to be made for the articles, work or services heretofore delivered, shall be in full adjustment, payment, and discharge of said agreement.

[Block 4] The payment by the United States of this award shall operate to vest in the United States title to the property described in "Schedule A" attached hereto.

[Block 7] No part of this award is made with respect to any portion of the agreement which was sub-let.

Recommended Sept. 15th, 1919. Approved, Washington, D. C., Sept. 19, 1919.

BOARD OF REVIEW,

Zone No. 2, Division of New York.

CLAIMS BOARD OFFICE, DIRECTOR OF PURCHASE,

By L. W. HOLDER, *Member (Major Q. M. C.)*,

By B. R. WELLINGTON, *Member*.

Made and approved by authority of the Secretary of War:

WAR DEPARTMENT CLAIMS BOARD,

By J. H. SCHLEY (*Member*).

Accepted Sept. 17th, 1919.

ALEXANDER PROPPER & Co.,

Claimant.

By ALEXANDER PROPPER (*Member of firm*).

Dated 9-20-19, Washington, D. C.

Contract No. 2006-N. Apr. 18, 1918. 15 Whitehall St., New York, N. Y.

The amount of the award was \$54,372.52, which amount was paid to and receipted for by the claimants. No fraud or mutual mistake entered into the making of the settlement.

5. Claimants are now making a claim against the Government for the sum of \$61,425 for alleged purchases and obligations in securing

material for the manufacture of 10 per cent for the over deliveries, which they claim were contracted for. They also claim that when the award was made and they received payment thereunder they were informed by the Government officials that accepting the award upon the contract would not bar recovery on this claim. This is denied by the Government officials with whom they dealt in making the settlement.

DECISION.

1. This case is presented to us apparently in two aspects:

(a) The claimants in their petition state that the claim arises out of the contract 2006-N by reason of an amount equal to 10 per cent of the 300,000 pairs of puttees being added to the number to be furnished, so that the contract should have read 330,000 instead of 300,000; and one of the claimants, Alexander Propper, testifies that he so understood it up to or about the time settlement was made upon the contract in question. The petition is sworn to on the 16th day of June, 1919, some days after the agreement terminating the contract in question was made.

(b) At the hearing of the case held before us on December 12, 1919, counsel for the claimant in opening his case stated that the claim was based upon what they term in their papers an "overage" claim, and that it was in reality a claim upon a contract supplementary to the written contract No. 2006-N, and all through his statement treated the claim as though it arose upon a contract entirely separated from the written contract and having the same sort of force as though it had been a separate contract for 30,000 puttees.

It appears from the evidence of their witness Harry Simon at the hearing above referred to that at the time of negotiating the written contract referred to he, Harry Simon, was the negotiating agent for the claimant, and that one F. E. Haight, Q. M. C., was the negotiating officer for the United States, and that at the time of these negotiations Haight, representing the Government, said to Simon, representing the claimants, that an overdelivery of 10 per cent of the amount of the contract would be allowed. It also appears from the testimony of said witness Simon that he notified the claimant of this statement alleged to have been made by Haight on the part of the Government; this witness, as well as Alexander Propper, one of these claimants, places the date of this conversation as having taken place on or about April 18, 1918. The written contract, 2006-N, bears date on April 18, 1918, but it appears was neither acknowledged nor delivered until on or about May 7. So it is perfectly clear under general law and under the decisions of this Board that, so far as the transactions have been stated between the parties up

to the delivery of the contract, any conversations or verbal agreements made between the parties were merged in the written contract, and that the oral negotiations or agreements can not vary, change, or modify the written contract in any way. (United States Industrial & Chemical Co., Inc., 2, Board of Contract Adjustment decisions, p. 200.)

It appears that while this contract was being negotiated and while it was being performed by the claimants, they also had other contracts with the Government for furnishing certain numbers of puttees of the same kind, with reference to which the claimants allege that they had similar oral agreements with the Government by which the amount or numbers named in those contracts could be increased by 10 per cent. It appears also that some time before the 15th of August, 1918, deliveries of an installment of the 10 per cent overage, as they call it, on one of the contracts being filled at the same time that this one was, were tendered to the Government and the Government inspector declined to inspect or accept the overdelivery. It appears from a fair construction of the testimony of the witness Simon for the claimants, and that of Lieut. Fuller, witness for the Government, that an installment of the overage was sometimes delivered with the installment under the contract. It also appears that upon the refusal of the inspector to pass that part of the overage tendered for delivery on the other contract, not this one, the claimant applied to Mr. Haight, the negotiating officer of the Government, for an order or for directions of some sort that the overage then tendered should be received; and thereupon, and under date of August 15, 1918, Mr. Haight directed Lieut. Fuller that concerns making puttees were allowed 10 per cent overshipment, and that this referred to the contracts of the claimants 1878-N and 2006-N. And thereupon and thence onward the 10 per cent overages were received on the contract 1878-N. It does not appear that any overages were ever delivered or tendered on the contract in question, 2006-N. This letter of Mr. Haight and the action of the claimants show quite plainly that nothing had transpired up to and including this letter to make a new and separate contract for 30,000 extra puttees, but only that if deliveries were tendered they would be accepted.

So far as the facts are concerned down to and including this letter, there was no contract about the so-called overages at all. A contract is supposed to bind both parties to it. There is nowhere found down to this point any agreement on the part of the claimants to deliver any number of puttees other than the definitive amount named in the written contract; but there was permission on the part of the Government to the inspector to pass them if tendered; or, stating the transaction most favorably to the claimants, there was a permission given to the claimants on August 15, 1918, to furnish overshipments

from time to time along with their shipments on the contract in question. It does not appear that at any time any deliveries of overages on this contract 2006-N were tendered or the acceptance of them declined.

It will be noted in findings of fact 1. that the contract itself contains in it a provision that the quantities to be delivered under the contract might be increased or decreased at the option of the United States to an amount named in the circular to bidders, but only by notice in writing served upon the contractor by the contracting officer. Mr. Haight was not the contracting officer in this case. Even should it appear that he had authority to buy goods, it nowhere appears that he had any authority to amend or change a written contract; and certainly he had no authority to make a new contract. Mr. Haight himself so testifies in another case as to a contract of a similar kind made at a date quite close to that of the contract in question. (Keystone Knitted Fabric Co. 1 Board of Contract Adjustment Decisions, p. 355.) Mr. Haight also testifies in effect that at the time of writing the letter of August 15, 1918, he did not suppose he was making a new contract but that he was acting under the written contract 2006-N. (N. T. Depositions, Dec. 22, 1919.) But if it is deemed that Mr. Haight had the authority to change the contract, he must of course have changed it by notification in writing, and the question still remains whether his letter of August 15, 1918, is such writing. It seems to us not to be such writing. It certainly does not require overdeliveries but only permits them. But if you give his authority and his letter and the effect of it the broadest possible construction, nevertheless whatever the effect of the letter is upon the contract, it is nevertheless a part of the contract to be construed with it, and is not a new contract, oral or written, formal or informal, or, as designated by the claimants "unofficial." Should the claimants construe it—which is inconceivable—as imposing any new or more onerous duty upon them than the original contract, even in that view of the case, they expended nothing on account of the modification, because Alexander Propper, one of the claimants, in his own testimony states that his expenditures and commitments for material ended on or about July 2, 1918.

We hold then that the conversation said to have taken place on or about the 18th day of April, 1918, between Simon, the agent of the claimants, and Haight, the negotiating officer of the Government, whatever they were, and whatever the understandings arising out of them, were merged in the written contract as finally signed and we hold also that any conversations between the same parties, or between any persons representing the contracting parties, were incompetent to change the written contract whenever held.

We hold also that the letter of Mr. Haight for the attention of Lieut. Fuller (findings of fact 3) did not change the contractual relation existing between the parties and did not impose upon the claimants any further or greater obligations than they were then under toward the Government and that any effect to be given to it would be only as a part of the written contract.

2. It appears from the evidence that on account of the armistice the above-named contract was suspended after it had been 86½ per cent performed. And it appears that on or about December 3, 1918, the claimants put in an application for a final adjustment of what was due them under contract 2006-N on account of its suspension, and put in a questionnaire, the material part of which is found in findings of fact 4. In this questionnaire they made a claim to be reimbursed and remunerated not only for what was due under their contract as originally written, but for the 10 per cent overage which they claim had been authoritatively added to it and based upon that questionnaire a final settlement or termination agreement, dated June 14, 1919, was made, which is also found in findings of fact 4, and in which it is recited as follows:

"In order to effect a settlement with the Government on contract 2006-N for 300,000 woolen spiral puttees, and in view of the fact that we have not supplied ourselves with all the necessary materials to complete said contract * * * we hereby agree to accept the terms set forth, etc. * * *."

This document has been called a termination agreement, but it is in effect a proposition from the claimants to the Government stating the terms under which they would adjust all amounts due them from the Government on account of the contract in question, and the amount which they themselves apparently arrived at and which is stated in the proposition at \$54,515.71, for which "we hereby waive all claims of whatsoever nature that we may have against the United States Government on contract 2006-N."

And later it appears that on September 17, 1919 an award (findings of fact 4) was made to the claimants in acceptance of their proposition of June 14, 1919, in which claimants were awarded \$54,372.52, being a sum within a few dollars of the amount which they had offered to take. They received this amount and thereafter by the terms of the award were precluded from making any further claim on account of the contract in question.

3. The termination of the contract, the award under it and the receipt of the money by the claimants are final, and they are forever precluded from raising any further questions or making any further claims under the contract unless there is some reason why the award should be set aside. (Claim of Joseph Friedman, 2 Board of Con-

tract Decisions, 170; 4 Elliott on Contracts, secs. 2968, 2969; claim L. H. Gilmer Co., 2 Board of Contract Decisions, 178; see also Beat-tie Mfg. Co. 2 Board of Contract Decisions, 252; Signal Knitting Mills, No. 2208, decided Dec. 3, 1919; Empire Biscuit Co., No. 292, decided Oct. 15, 1919; Cramp Shipbuilding Co. v. U. S., 206 U. S., p. 118, 239 U. S., p. 221.)

There is abundant internal evidence in the record that the claimants have fully realized their situation in this respect and hence they have sought ways to avoid the full effect of the settlement. They have approached the avoidance of this settlement, or the avoidance of the effect of it, from two standpoints: First, they seek to claim that the settlement in question did not refer in any manner to the contract upon which they are claiming; that they are claiming in this case upon a separate, distinct, oral contract, which should be read as though it were for 30,000, and as though it had no reference of any kind to the written contract 2006-N. That is to say, that they had at the same time, concerning the same subject matter, two contracts with the Government, one for 300,000 puttees and one for 30,000 puttees; one a written, formal contract for 300,000 puttees, and one an oral contract for 30,000 puttees, both running along side by side. We are of opinion that this position is untenable.

Second: They seem to claim that the settlement was made under some mutual mistake or under duress, or by being fraudulently or mistakenly induced thereunto by statements of officers of the Government engaged in the settlement or otherwise.

To set aside a termination agreement entered into with the deliberation with which this one was, on the ground of fraud or misrepresentation of the Government officers who were exercising their functions at the time, should require evidence of the most convincing kind.

It would not be profitable to go minutely or at length into the testimony on the subject, but we shall give an abstract of it only so far as it touches the precise point of misrepresentation. To set aside the settlement the claimants rely on the testimony of their agent, Harry Simon, and that of Alexander Propper, one of the claimants, as to conversations had by them with E. P. Darrow, Chief of the Knit Goods Division, and Capt. F. C. Wightman, chairman of the Board of Contract Adjustment, Zone Supply Office, New York. The testimony was given at a hearing before this Board on December 12, 1919. At the times to which the witnesses Harry Simon and Alexander Propper refer in their testimony, the Board before which they appeared in making the final settlement was made up of five members, among whom were Capt. F. C. Wightman, chairman, Capt. George W. Reed, Lieut. H. M. Blaikie, and Mr. Wolf, a civilian member.

The testimony of Harry Simon was to the effect that during a conversation had with E. P. Darrow some time between December 23, 1918, and June 14, 1919, Darrow said to him that this particular contract (for overage) had nothing to do with the original contract, and in answer to his inquiry as to whether they would be signing their rights away if they signed the contract Darrow answered "No." That he then went and told Mr. Propper of this conversation; that he and Mr. Propper then went over to see Capt. Wightman, and that he asked Capt. Wightman, or Mr. Propper did in his presence, whether signing the termination agreement would waive their claim on the 10 per cent overage, and that Capt. Wightman said, "No, we will clean the whole matter up, this has nothing to do with it; it is a separate contract altogether," and thereupon the contract was signed; that he thought the conversation with Capt. Wightman was on June 14, 1919; that he conversed with Mr. Darrow and Capt. Wightman at the time of the termination agreement, but that he had no "dealings" with Capt. Reed; that he had not met him until to-day (the date of the hearing, December 12, 1919), and that he had no dealings with Lieut. Blaikie, but in making this deal relied on Mr. Darrow and Capt. Wightman.

Alexander Propper, one of the claimants, testified to the effect: That when he filled out the questionnaire he supposed the claim (for overage) to be a part of the contract, and was told by two inspectors (Kennedy and Kuntz) because he thought so to put it in; that before the termination agreement was signed, but on the same day (June 14, 1919) Capt. Wightman told him the Board had no jurisdiction over anything but the actual completion of the original contract; that the 10 per cent overage was an unofficial contract and that he had no jurisdiction whatever over it; that Mr. Darrow told him he had taken it up with the C. & E. Division in Washington and that they had informed him that it was a separate and distinct contract and had nothing to do with the original 2006-N; that for that reason they had no authority in New York to pass on it, and that witness was waiving his claim by signing the termination agreement; that Capt. Wightman knew at the time of signing this agreement that the claim for overage was pending before this Board.

NOTE.—It appears from the record that the claimants filed a claim with the Claims Board, Office of Director of Purchase (stamp March 22, 1919) on 2006-N being for "the manufacture of 30,000 pairs of spiral puttees * * * being 10 per cent additional on the original contract." That Board found there was no contract and disallowed the claim May 23, 1919. The petition filed with this Board, is for an allowance of the same claim and is sworn to June 16, 1919.

Mr. Propper further testified in effect: That he did not recall any conversation with Capt. Reed before signing the award, but did have

conversations with him afterwards; that he was not informed by Capt. Reed that by accepting the award and receiving the money he would be barred from presenting further claims under the contract; that he did not have a conference with Capt. Reed and hesitated about signing it, but that he did have a conference with Capt. Wightman and hesitated; that he did not know that Capt. Reed was on the Board until after he signed the agreement; that at the time he accepted the award and signed the receipt for it and accepted the findings of the Board, and although the award stated in distinct terms that it was in full he took the word of these gentlemen (Darrow and Wightman) because he was informed that the 10 per cent was not a part of 2006-N, but was separate and distinct and the Board knew there was a claim pending for it here; that he was informed afterwards by Capt. Reed that he was waiving his claim.

Capt. George W. Reed, a witness for the Government, was examined at very great length by the Government and also by the claimant; and so far as his testimony relates to the alleged misrepresentations is as follows: That he was a member of the Contract Adjustment Board, Zone Supply Office, New York; that he was acting generally in a legal capacity as a member of that Board of Contract Adjustment; that he was present at the time of the settlement, and that there were also present Capt. Wightman, the chairman, Lieut. Blaikie, and Mr. Wolf, the civilian member; that Mr. Darrow was not a member of the Board though he was sometimes asked to sit upon it on account of his knowledge of knit goods and that he was present a part of the time and was in and out of the Board rooms at different times; that he remembered distinctly that Mr. Propper sat on the opposite side of the table from him and that he had pens and penholders lying there on the table and that he took up a pen with which to sign this paper (termination agreement) and that he hesitated a considerable time; that he said to Mr. Propper that they could not make any allowances whatsoever for any overage over and above the amount actually necessary to manufacture the balance of the order or contract undelivered, and that if he had any such claim he would have to make it a special matter of some separate proceeding; that Mr. Propper signed and his signature was witnessed by Capt. Wightman and Lieut. Blaikie; that afterwards, the date whereof he did not know, but after Mr. Propper had filed his claim in Washington, he came back to him and said that he could get recompense or compensation for this overage if he could get a certain form of affidavit suggested by a certain major (Maj. Miller of the trial section of this Board) to the effect that some one on the Board had told him that he was not waiving his rights when he signed the agreement of settlement or the award; that he made the request in my presence to me and Capt. Wightman in the Board Room at

Thirty-fourth Street and Eighth Avenue; that he told Mr. Propper that should he make such statement as that to him it would be a false statement, and that he knew no officer on the Board would make such a statement in his presence because he could not let it go unchallenged if made; that Mr. Propper then said that he was not certain who had made the statement to him; that he did not pin it on either Mr. Darrow or Capt. Wightman or on him; that he then said to Mr. Propper that he (Propper) ought to have known that he was signing a release in full of all demands; that he had read the paper and that Propper answered and said that he guessed he had read it and that then Capt. Reed said to Mr. Propper "Don't you remember that you sat at the table and you hesitated a long time before you signed that agreement to make the settlement?" And Propper said "Yes, I remember I hesitated." That he knew that Propper was signing a release and that he should have known it, and that he (Reed) could not let any such statement as fraud or duress or any word of that kind, whatever he may have used, go unchallenged; that Propper did not state to him what he had told the major (Maj. Miller); that to his knowledge or recollection nothing was said to Mr. Propper at the time of the settlement that lead him to believe he was not settling in full, and that nothing was said to Propper prior to the date of the award to the knowledge or belief of witness that would tend to change his opinion that Propper knew he was signing a release; that the Government officials, the Board, and the witnesses all understood that this was the closing of that contract; that settlement was for contract 2006-N, and whatever was understood under the terms and conditions of the contract; that if he thought he had another claim he could seek his remedy elsewhere; and that he told Mr. Propper distinctly that he had no case for overage.

Capt. F. C. Wightman, witness for the Government, testified in effect: That at the time of the settlement he was a captain in the Quartermaster Corps, and that he was a member of the Board of Contract Adjustment, C. & E. Division; that when the Propper settlement came up in June (1919) it had been examined by the Board consisting of five members; that the inventory for the questionnaire had previously been taken by E. P. Darrow, chief of the Knit Goods Division; that at the time of the settlement (June 14, 1919), the Board consisted of Mr. Wolf, Capt. Reed, Lieut. Blaikie, and himself; that Capt. Reed, Lieut. Blaikie, and he (Capt. Wightman) were present; that previous to the presentation to the Board the papers had been examined by Alexander Propper and he knew what adjustment would be awarded; that the questionnaire was before them and was discussed with Mr. Propper before he entered into the agreement of June 14, 1919; that neither he nor any member of the Board in

his presence made any statement to Mr. Propper by which he might be led to believe that any further amount would be paid him on the contract in addition to the sum he would receive under the settlement, nor any further allowance than the amount stated in the questionnaire or "these papers;" that some time in December (1919) Propper stopped in his office and asked him if he would give him (Propper) a letter to the effect that the signing of the adjustment would not affect any future claim; that somebody in Washington requested it; I told him I could not give it to him. There was no assurance to that effect given by me or anybody in my hearing; that any conversation had with Mr. Propper was had only in the presence of the Board, and that Capt. Reed and Lieut. Blaikie would bear him out in stating that there was no assurance given to Alexander Propper that in signing it it would allow him any additional award; that it was understood by Alexander Propper, and also by all members of the Board that the settlement was final and in full satisfaction and adjustment of all claims whatsoever, including the claim he is now making before this Board arising out of that contract; the release which he signed states that he waives all future claims on this contract; that it was not up to the Board to handle verbal contracts; that the settlement of June 14 (1919) included the 10 per cent overage; it included everything in that contract; we had no authority to include the 10 per cent overage: that they had no right to put it in; that they allowed the claim only on that material required to finish the uncompleted portion of the contract; that the questionnaire claimed for the 30,000 pairs, being 10 per cent of the 300,000 pairs in the contract, and that in making the settlement with Propper they made the award on the questionnaire as well as upon the settlement agreement of June 14, 1919; that Propper made the same claim in the questionnaire that he is now making before this Board.

Lieut. H. M. Blaikie testified in effect: That he was a lieutenant in the Quartermaster's Corps and that he was assistant to the administrative officer of the Procurement Division; that he witnessed the termination agreement dated June 14, 1919; that there were present when the paper was signed, Capt. Wightman, Capt. Reed, and himself; that Mr. Wolf might have been present but that he did not remember; that neither he himself made nor had he heard any one else make any statement to Mr. Propper to the effect that by signing that paper he would not waive his right to collect from the Government for the 10 per cent overcharge.

E. P. Darrow, a witness for the Government, by deposition taken in New York on December 22, 1919, testified in effect as follows: That he had been during the war in charge of the knit goods inspection in the New York Zone Supply Office; that he was acquainted with Mr. Propper and Mr. Simon, and had met them in connection with

the adjustment of their contracts; that he did not recall any conversation with Mr. Simon and Mr. Propper at the time of signing the termination agreement and the winding up of the contract No. 2006-N that the settlement they were then making would not preclude or bar them from presenting this claim to the Board of Contract Adjustment at Washington; that he did not remember any conversation either with Mr. Propper or with Mr. Simon in regard to this particular feature of it; that he had many conversations with them about the different phases of the adjustment, but that he did not recall anything to the effect above named; that he had no recollection of making any such statement to any one; that it was very well fixed in his mind that if they signed the termination agreement they waived all claim under that particular contract; and that he advised another contractor by letter in May of the same year, under similar circumstances, not to accept a settlement of the contract with a view of presenting a claim for the 10 per cent overage at Washington; that his understanding was that if they signed the termination agreement they could not obtain a settlement on the other claim after the agreement had been signed; that he held that view at the time, and that he has held such view of the matter ever since the adjustment of these contracts came up; that holding this view he did not see how he could have told Mr. Simon and Mr. Propper that by signing the termination agreement they would not preclude themselves from obtaining the 10 per cent overages; that he had nothing to do with the termination agreement, and that his duties were to make recommendations: that he passed upon the adjustment contracts but not on termination agreements; that his word was not final, but that his recommendations were passed on first by the Board of Contract Adjustment, now called the Board of Review; that the only thing he had to do with the termination agreement of June 14 (1919), was in making his recommendation; that he passed on the point when contractors made a claim for overage in making an adjustment; that he turned them down and refused to adjust the overage; that his reason for doing so was that it was discussed by the C. & E. Division in Washington who had charge of the adjustments of contracts and they decided that they could not recover for this; that it was not on the question of authority, as I recall it, but was simply on the ground that there was no contract, and that the 10 per cent overage was a custom that had grown up and was not a part of the contract; that it was simply allowed for the convenience of the contractor, as he was not able to estimate exactly the amount of material that would be required, and that it was not a part of the contract, and that he advised Mr. Propper and Mr. Simon that here in New York they could not recognize the 30,000 overage; that they had no authority to do so; that he knew at the time that Propper &

Co. had a pending claim for overage; it was a part of their questionnaire.

It has been difficult to abstract the above testimony. Frequently it developed colloquially and was sometimes elusive, but it is believed that the above statement of it is essentially accurate so far as it is intended to touch the point in question. It is the opinion of the Board that the claimants do not establish their point by the testimony introduced on their behalf without giving any consideration at all to the Government's testimony. And when considered in connection with the Government's testimony, it is the opinion of the Board that any claim of fraud, misrepresentation, or wrongful or mistaken inducement to enter into the termination contract, and to accept the award and the money under it, is completely negatived.

4. The claimants, as a part of their case, for reasons not quite apparent to the Board, introduced a letter dated June 2, 1919, purporting to have been written by Capt. F. C. Wightman, Q. M. C., to Harris & Stern, of New York; subject, spiral puttees, Alexander Propper & Co., but which, by the testimony in the case, appears not to have been written by Capt. Wightman at all, but to have been written by E. P. Darrow and signed by him with Capt. Wightman's name, but which never came to his attention. The letter states, first, that the addressee is advised that Alexander Propper & Co. "have consented to the plan of adjustment and list for adjustment on their contract cloth which they have on hand in quantity more than enough to complete their contract." Second, "that Alexander Propper & Co. have also filed, or are about to file, a claim for recognition of an unofficial contract for a further quantity of spiral puttees." Third, "You will see that we can not recognize your claim on account of contract No. 2006-N, and that we can not state as to that outcome of his application for recognition of the unofficial contract, and that we can not tell what material they will list for adjustment provided the unofficial contract is recognized."

The letter is immaterial to any issue before us. It is not important whether it was written by Capt. Wightman or E. P. Darrow. It in no way seems to have a bearing on the case other than as an attempt to prove that Capt. Wightman had knowledge of the unofficial contract upon which the claimants were making claim. E. P. Darrow, who wrote the letter, says he knew about the contract; Capt. Wightman may or may not have known about the contract, and whether he did or not is of no consequence. It is a matter of public knowledge that there was such a claim because it had been presented to the Claims Board, Office of Director of Purchase, and had been disallowed on May 23, 1919. Both Capt. Wightman and Mr. Darrow may have known of this claim and may have known of its disallowance, but neither of them could have known, except

by rumor, that a claim was at the date of this letter, June 2, 1919, or at the date of the termination agreement, June 14, 1919, pending before this Board or any board, inasmuch as it appears by the record that the petition filed with this Board for allowance of the claim is sworn to June 16, 1919. The letter can not be used as any evidence, even remote, as showing bad faith on the part of either Capt. Wightman or Mr. Darrow, and is of no importance whatever.

The decision of the Claims Board, Director of Purchase, rendered May 23, 1919, disallowing the claim, is affirmed, and the claim is disallowed.

Notice of this action should be sent to the Claims Board, Office of Director of Purchase, as requested by that Board.

Col. Delafield, Mr. Eaton, and Mr. Huidekoper concurring.

Case No. 1917.

In re CLAIM OF THE OHIO RUBBER CO.

1. **SUSPENSION OF CONTRACT—COMMITMENTS—UNABSORBED OVER-HEAD EXPENSES.**—Where claimant had a contract to furnish the Government 200,000 feet of shock-absorber cord for \$33,333.33, and such contract was suspended by the Government before completion, and where claimant had incurred practically all of its expenses before the termination of the contract, claimant is entitled in addition to its commitments reimbursement of its expenditures up to but not exceeding the net amount it would have received if the contract had been completed.
2. **CLAIM AND DECISION.**—This is an appeal from the Air Service Claims Board and is presented under General Order 103, upon the theory that claimant is entitled to reimbursement for commitments and unabsorbed overhead expenses which accrued prior to the suspension of the contract. Held, that the claimant is entitled to reimbursement of its expenditures up to but not exceeding the net amount that it would have received if the contract had been completed; that in addition to \$333.60 for commitments, claimant is entitled to receive \$1,552.76, being 9.0909 per cent of \$1,779.33, representing the uncompleted portion of its contract.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim comes on appeal from the Claims Board, Air Service. It arises out of the suspension of a formal contract, dated September 28, 1918, between the United States represented by Capt. F. D. Schnacke, A. S. A. P., and the claimant, Contract No. 4802, for the manufacture of certain shock-absorber cord specified in order No. 720574. The amount claimed is as follows:

For settlement of commitments to subcontractor.....	\$333. 60
Selling expenses incurred by contractors, being 11.06 per cent of \$17,079.33, the uncompleted portion of contract.....	1, 888. 98
Total	2, 222. 68

The Air Service Claims Board allowed the \$333.60 but disallowed the \$1,888.98.

This claim was heard with another claim of the Ohio Rubber Co., No. 150-C-1906. The two are similar in fact and are governed by the same principles.

2. Claimant is a selling organization, acting as sales agent for various large companies with which it has affiliations. It is not engaged in the manufacture of any material or merchandise. In con-

nection with making sales, it performs development and engineering services.

3. Claimant is the exclusive selling agent of the J. W. Wood Elastic Web Co., Stoughton, Mass., which has no selling organization and no selling expense whatsoever, but is solely a manufacturer.

4. The contract price at which claimant agreed to manufacture order No. 720506 was \$33,333.33. It made a contract with J. W. Wood Elastic Web Co. to do the actual manufacturing at \$30,303.03, and had the contract been completed the claimant's compensation, including both its expenses and any profits, would have been 10 per cent of this amount, or \$3,030.30.

5. On December 7, 1918, claimant's contract was suspended by the Government, and it appears that there was then a part uncompleted for which, when completed, there would have been due claimant \$17,079.33. The claim filed is for 11.06 per cent of this amount, or \$1,888.98. This is upon the theory that claimant is entitled to be allowed such proportion of its annual expense as the amount of this contract bears to the aggregate amount of all its contracts made during the year. At the time the claim was filed the claimant's expenses for the year ending December 31, 1918, had not been determined and could not then be determined. The claim was accordingly based upon claimant's average yearly expenses for the preceding three years.

6. Claimant's expenses for the year ending December 31, 1918, have since been determined. They were, as appears from the testimony, 9.886 per cent of its total business, and it accordingly now seeks an allowance of 9.886 instead of 11.06 per cent on \$17,079.33.

7. Practically all of claimant's expenses in negotiating and procuring any contract are incurred before the signing thereof. In connection with this and other contracts which the claimant had with the Government for shock-absorber cord, it rendered extensive services in devising and specifying the kind of cord which would meet the Government's requirements.

8. Early in 1918 claimant obtained its first order from the Government for shock-absorber cord. This proved to be not what was wanted. At the request of the Government claimant's sales manager went to Washington and to other places, collaborated with Government experts, and worked out the specifications required. The claimant's entire organization, so far as they could assist in the matter, engaged in the work of designating and specifying the article finally adopted. The expenditures made by the claimant in this connection are included in its expenditures for the year, and the year's expenses are referred to by its auditor as "overhead expenses."

9. The cord, as specified in claimant's first contract with the Government, pulled about 40 pounds when drawn out 100 per cent of its

normal length. That was not stiff enough. Claimant was asked to bring it up to the highest possible point, and brought it up to a resistance of 190 pounds when drawn out 100 per cent of its normal length.

10. The claimant is said to have received orders for about 65 per cent of the shock absorber cord purchased by the Government, and was given large freedom in the determination of the quality and character of the cord.

DECISION.

1. The claimant is entitled to reimbursement of its expenditures, obligations, or liabilities necessarily incurred in performing or preparing to perform the contract in question.

2. The evidence indicates that the expenses of the claimant are not apportioned to particular contracts but are treated, *in toto*, as overhead. Its sales manager and auditor testify that the total expenses of the company for the year 1918 were 9.886 per cent of the aggregate amount of all its sales for that year. They claim that, accordingly, the expense of the company incurred in connection with this particular contract is 9.886 per cent of the contract price, and that hence claimant should be allowed 9.886 per cent of the price of the uncompleted portion of the contract.

3. According to claimant's theory, had the contract been completed, its profit, if any, would have been included in the \$3,030.30, the difference between the contract price and the price it would have paid the subcontractor.

4. Claimant's percentage of overhead, however, being figured on the contract price of \$33,333.33, is greater than the difference between the price it was to receive and the price it was to pay its subcontractor. This difference, \$3,030.30, is 9.0909 per cent of the Government contract price. If the overhead is 9.886 of the Government contract price, there would have been a loss on the contract.

5. Inasmuch as the expenditures of the claimant in connection with the contract were made before it was terminated, it is entitled to reimbursement of its expenditures up to, but not exceeding the net amount it would have received if the contract had been completed. It should, therefore, be allowed the amount already fixed by the Air Service Claims Board for its expenditure in settlement of commitments, \$333.60, and an additional sum of \$1,552.76 being 9.9090 per cent of the \$17,079.33, representing the uncompleted portion of its contract.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for appropriate action.

Col. Delafield and Mr. Hamilton concurring.

Case No. 625.

In re CLAIM OF ISAAC G. JOHNSON AND CO.

1. **ALLOCATION; NOT AN AGREEMENT.**—Where claimant continually urged the War Industries Board to allocate to it a large quantity of pig iron, claimant not having sufficient business on hand to demand such a large quantity, but expecting to get sufficient business, and secured such allocation and by reason of the armistice the business was not secured, there is no agreement, express or implied, on the part of the Government to reimburse claimant its loss on the pig iron.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919 for \$117,400, loss sustained because large quantities of pig iron were allocated to claimant, at its request. Held, claimant is not entitled to recover.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. The claim comes to this Board as a class B informal claim. The claimant, Isaac G. Johnson & Co., is a New York corporation engaged in the manufacture of steel castings at Spuyten Duyvil, N. Y., and in manufacturing such castings required considerable quantities of pig iron of low phosphorus content in order to produce the high grade product in which it specialized.

2. On July 1, 1918, the claimant apparently making provision for its future requirements for this grade of pig iron wrote a letter to Mr. Leonard Peckitt, a member of the subcommittee on pig iron, iron ore, and lake transportation of the War Industries Board, in which it was stated that the requirements of the claimant were approximately 500 tons per month, to which the following reply was received:

“Owing to the scarcity of low phosphorus pig iron and to the fact that there is, perhaps, hardly enough to go around * * *.”

“Just as soon as it is decided what tonnage and what class iron you are entitled to the matter will be referred back to our committee for allocation, after which it will be a great pleasure to serve you to the best of our ability.”

A further letter from the War Industries Board requested that a representative of the claimant call at the office of that Board for conference in connection with pig iron requirements. Mr. Davey of

the claimant company called at the office of the War Industries Board once in connection with pig-iron requirements. Mr. Davey of the claimant company called at the office of the War Industries Board and negotiations for its supply of pig iron were carried on with Mr. Leonard Williams of that Board. Later and during the month of August and September further correspondence was had between claimant and the War Industries Board, the tenor of which indicates the urgent request for allocation to the claimant to meet his requirements and the reluctance of the War Industries Board to make any allocation to him until he clearly demonstrated his actual need for the quantity requested. Even as late as September 14, 1918, the War Industries Board wrote claimant that--

"as the supply of low phosphorus pig iron is so nearly exhausted, it is going to be impossible for us to give you any over and above your absolute necessities."

3. Negotiations were continued until October when claimant was advised by the War Industries Board that by allocation request No. 888, 300 tons had been allowed claimant for the last quarter of 1918 and by allocation request No. 889, 6,600 tons for the first half of 1919. Claimant thereupon entered into contracts with the companies who had been authorized by these allocation requests to ship him pig iron as follows:

October 4, Northern Iron Co., 900 tons during October, November, December, 1918.

October 4, Northern Iron Co., 1,600 tons during first half of 1919.

October 8, Bethlehem Steel Co., 3,400 gross tons for delivery during first of 1919.

October 8, Bethlehem Steel Co., 1,500 gross tons for delivery during October, November, December, 1918.

October 31, Eastern Steel Co., 1,600 tons during first half of 1919.

4. At the time of entering into these contracts the claimant had on hand orders from various automobile manufacturers for castings to be used in Government trucks in the process of manufacture by such companies. The total of these orders on hand, however, was only sufficient to cover a small part of the tonnage contracted for during the last quarter of 1918. Claimant had no orders covering any part of the iron to be used during 1919. Upon this, however, claimant states that the company expected to receive all the contracts it could handle.

5. Shortly after the signing of the armistice, the orders then on hand with the claimant company were cancelled by the prime contractors and settlement agreements entered into, through which provision was made for loss on so much of the pig iron on hand as might properly be chargeable to those contracts. As to the balance on hand

and on order, claimant with respect to the Bethlehem Steel Co. and the Eastern Steel Co. entered into settlement agreement based upon a differential of \$10 per ton on the market decline, and paid on cancellation of its orders \$44,030 to the Bethlehem Steel Co. and \$24,207 to the Eastern Steel Co. The Northern Iron Co., however, demanded \$21.50 per ton for the cancellation of its contracts and the claimant refusing to pay, a suit was instituted in the New York Supreme Court against claimant by the Northern Iron Co. in the amount of \$35,771.15.

6. The claim here presented is to cover the sums paid in settlement of cancelled orders for pig iron as well as the amount sued for by the Northern Iron Co. as claimant states he has no defense to that suit.

DECISION.

1. While the theory of the claimant upon the trial and also in a brief submitted by his counsel is that the allocations by the War Industries Board were in their nature compulsory in that claimant could not refuse to contract for the full amount of these allocations when they were made to him, the documentary proof offered as well as the testimony of Mr. Williams of the War Industries Board, would indicate quite the contrary to be true. Not only did Mr. Williams testify that the claimant might have taken any smaller amount of iron but the correspondence in evidence shows clearly that the claimant was making every effort to secure allocations of pig iron to provide for what he thought his future requirements might be; and statements made as to quantities in his plant and orders he expected to receive were made in his endeavor to overcome the reluctance of the War Industries Board to make him as large an allotment as he desired.

2. The record makes it quite clear, therefore, that the contracts entered into by claimant were entirely in anticipation of orders he expected to receive, and which, owing to the intervention of the armistice, he did not secure. In making provision for such anticipated orders, his actions were merely those of a usual business risk and not such as place an obligation upon the United States either expressly or by implication to reimburse him any loss sustained by claimant in connection with their cancellation.

3. Upon the facts shown, this Board is unable to recommend an award covering any part of the claim.

Col. Delafield and Mr. Bryant concurring.

Case No. 2375.

In re CLAIM OF TAFT-PIERCE MANUFACTURING CO.

1. **BREACH, WAIVER OF.**—Where a contract provides certain options which may be exercised by the United States in case of breach by the contractor, the United States must act with reasonable promptness after knowledge of a breach if it desires to take advantage thereof, otherwise the breach is waived.
2. **BREACH—WAIVER, EVIDENCE OF.**—The United States waives a breach where, with knowledge thereof, it permits the contractor to incur further expense under the belief, or with reasonable grounds for belief, that it will not enforce its options on account of the breach. A letter notifying the contractor that an effort will be made to adjust contractor's claim for damages growing out of an order to stop production, is evidence that no breach was claimed.
3. **CLAIM AND DECISION.**—Appeal from Air Service Claims Board disallowing claim because of claimant's breach of the contract. Held, breach, if any, was waived by the United States. Decision of the Air Service Claims Board set aside and claim transmitted to the Air Service Claims Board for adjustment.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This is an appeal taken by the contractor from the decision of the Claims Board, Air Service, which denied the claimant's claim for the reason as stated in the decision of said Board of December 16, 1919, "that the contractor failed to perform his contract and therefore breached the same, that said breach by contractor was not contributed to by any fault of the Government, or its agents, and no extension of time was asked for by the contractor or granted by the Government, therefore the contract appears to have been terminated solely by breach of the contractor and this Board has no further jurisdiction."

FINDINGS OF FACT.

On August 2, 1918, the United States by F. D. Schnacke, first lieutenant, A. S., A. P., and the claimant executed formal contract No. 4405 for the delivery of certain material described in an order (No. 380553) incorporated in the contract by reference.

The United States agreed by Article IV thereof to pay the prices stipulated in the said order for all supplies delivered in conformity

with the requirements on or before the dates specified and accepted, making a total consideration of \$15,836.

Article V of the contract was as follows:

"In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the Government may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the Government of having the articles or equipment completed; (d) or may permit the said contractor to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as and if provided in the attached order."

The order incorporated by reference sets out 14 items covering 49 tools, described by certain drawings and identified by number. By a note at the end of said order certain delivery dates were prescribed as to each of the said items. All tools called for by the contract under the 14 items, other than the tools under item No. S-186 and S-189, were manufactured, inspected, and accepted by the United States, and the purchase price thereof paid. With respect to item S-186, the contract provides that delivery shall be commenced in one month and be completed in three months. As to item S-189, it is provided that deliveries shall commence in two months and be completed in four months. Two of the tools called for under item S-186 had been delivered prior to December 10, 1918. It appears that the three tools under said item were completed and ready for inspection on or about October 31, 1918. None of the three tools under item S-189 had been delivered prior to the said date, but it is claimed by the claimant company that such tools were on that date approximately 65 per cent completed.

On December 10, 1918, the claimant received the following telegram:

"Stop production on item S dash one eight nine of order three eight naught five five three covering equipment for motor assembly plant stop. Incur no further expense therewith. Stop. Acknowledge receipt."

On December 12, 1918, the Bureau of Aircraft Production wrote the claimant as follows:

From: Office Director of Aircraft Production.

To: Taft-Peirce Mfg. Co., Woonsocket, R. I.

Subject: Suspension of work.

1. This letter confirms our telegram to you of December 10, 1918, reading as follows:

"Stop production on item S dash one eight nine of order three eight naught five five three, covering equipment for motor assembly plant stop Incur no further expense therewith stop Acknowledge receipt."

2. Owing to certain technical Government laws and regulations it would work hardship on a contractor if this office were to cancel this contract outright. You will, however, understand that the request that you stop production is intended virtually to effect a cancellation except as to the quantities specified for production.

3. In this connection you are advised that you should engage no new labor or replace labor without the prior approval of this office. All Sunday, night, and overtime labor should be discontinued. No new contracts should be made with suppliers or subcontractors without first obtaining the prior approval of this office.

4. The Finance Division of this Bureau will make an investigation as to the expenses incurred by you which are chargeable to this contract and will furthermore endeavor to arrive at a tentative basis of settlement with your company subject to final approval by the Bureau of Aircraft Production in Washington.

By direction of the Director of Aircraft Production.

F. D. SCHNACKE,
Captain, A. S. A. P.

DECISION.

It was the duty of the United States, if it wished to act under Article V of the contract, to do so with reasonable promptness. Otherwise it must be held to have waived its right to act thereunder. It can not permit the contractor to proceed after an act which might be claimed to amount to breach has occurred, and which is known to the United States, and, after the contractor has incurred further expense under the belief or with reasonable grounds to believe that the omission has been waived, then claim a breach.

The last delivery date under the contract for tools specified under item S-186 was November 31, and that of item S-189 was October 30. No action was taken by the United States indicating that it claimed any failure of performance by the contractor until the Claims Board, Aircraft Production, made such claim on December 16, 1919. The telegram of December 10 was not action under Article V. It was nothing more or less than a request to stop production. This telegram is explained by the letter of December 12, 1918, set out above. This letter is not notice of a breach, nor of an intent to rescind, nor anywise of an intention to act under Article V. The contractor is notified that the Finance Division of the Bureau will make an investigation as to the expenses incurred by the contractor which are chargeable to the contract and will endeavor to arrive at a tentative basis of settlement subject to final approval by the Bureau of Aircraft Production. This letter is evidence that no breach was claimed by the United States up to that time.

No breach having been claimed by the United States within a reasonable time after grounds for claiming a breach accrued, such breach, if any occurred, was waived by the United States. The settlement of this contract should therefore proceed pursuant to the provisions of Supply Circular 111 and other circulars pertinent to the subject matter.

This contract not having been terminated by breach or otherwise, but its performance having been suspended by the contractor at the request of the United States, the Secretary of War has jurisdiction to determine the rights and obligations of the parties thereunder and to make the proper settlement thereof. The Air Service Claims Board, as Agent of the Secretary of War, has jurisdiction accordingly.

DISPOSITION.

The decision of the Air Service Claims Board will be set aside and the papers herein transmitted to that Board for further proceedings pursuant to this decision.

Col. Delafield and Mr. Bryant concurring.

Case No. 732.

In re CLAIM OF C. KENYON CO. (INC.).

1. **JURISDICTION — TERMINATED PROXY-SIGNED CONTRACT.**— Where claimant had a formal proxy-signed contract to manufacture certain articles for the Government, and such contract has been terminated or cancelled pursuant to order of the Secretary of War, the Secretary of War or the Board of Contract Adjustment has jurisdiction under the act of March 2, 1919, to adjust a claim arising out of the termination of said contract.
2. **CLAIM AND DECISION.**—Claim on proxy-signed contract under G. O. 103; Held, should be amended or considered amended to bring it within the act of March 2, 1919. Held further, that, under the facts shown by the record, the contract was terminated, but contract being proxy signed Board has jurisdiction.

Mr. Harding writing the opinion of the Board.

This claim is presented in accordance with G. O. No. 103, War Department, 1918, and is for (amount not stated) under the following circumstances:

FINDINGS OF FACT.

1. On the 22d day of October, 1917, the claimant, C. Kenyon Co. (Inc.), of Brooklyn, N. Y., entered into a contract, No. 1514, with the United States through Colonel M. Gray Zalinski, Quartermaster Corps, United States Army, an officer acting under the authority, direction or instruction of the Secretary of War. The contract by its terms expired the 31st day of December, 1918. The contract is a formal contract, proxy signed by Captain V. Stone, Q. M. H. R. S., and provides that between the dates of October 22, 1917, and December 31, 1918, the contractor shall furnish and deliver to the depot of the Quartermaster Corps, United States Army, New York, N. Y., approximately 675,000 slickers as per specifications, at a price and sizes fixed. Delivery was to be made of 75,000 slickers monthly commencing during April so as to complete delivery during December, 1918. Two or more supplementary contracts were subsequently entered into between the contractor and the Government modifying in some respects the terms of the original contract, but they need not be considered here. The contractor entered upon the performance of its contract.

2. On August 9, 1918, the Secretary of War addressed a memorandum to the Acting Quartermaster General directing a cancellation of the contract, which is as follows:

WAR DEPARTMENT. *Wash., D. C., August 9, 1918.*

MEMORANDUM FOR THE ACTING QUARTERMASTER GENERAL.

Subject: Raincoat frauds.

With regard to your memorandum of August 3, relative to raincoat frauds, I direct that the following action be taken:

1. Cancel immediately all contracts now outstanding for raincoats with the firms, companies, corporations, and individuals, who or whose representatives have been indicted in connection with alleged fraud, bribery, or corruption with regard to the selling of raincoats to the War Department.

2. Commandeer in the hands of all such persons whose contracts are canceled their existing supplies of raw materials, partly manufactured materials, and completed raincoats.

3. Inspect all raincoats so commandeered, put into stock those which are up to specification, and those which are rejected hold on account of the contractor from whom they were taken.

4. Proceed, either by commandeering and operating factories whose contracts are cancelled as above set forth, or by letting new contracts to companies and individuals not involved in these frauds, to increase the supply of raincoats until the needed supply is obtained.

NEWTON D. BAKER,
Secretary of War.

And on August 20, 1918, a cancellation by direction of the Secretary of War was sent to the claimant in the following terms:

[Clothing and Equipage Division. Address reply to 109 East 16th Street, New York City.]

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
New York City, August 20, 1918.

In answer refer to File No. CE-A.

From: Acting Quartermaster General, C. & E. Division.

To: C. Kenyon & Co., 754 Pacific Ave., Brooklyn, N. Y.

Subject: Raincoat contracts Nos. 863, dated Sept. 7, 1917; 1381, dated June 20, 1917; 1514, dated Oct. 22, 1917.

This is to notify you that your contracts Nos. 863, dated September 7, 1917; 1381, dated June 20, 1917; and 1514, dated October 22, 1917, with the C. & E. Division of the Quartermaster's Corps, for the manufacture of raincoats, is hereby cancelled and terminated in accordance with the direction of the Secretary of War.

CONTRACTING BRANCH,
By S. W. SHAFFER,
S. E. SHAFFER,
Captain, Q. M. C.

The claimant company thereupon, on August 21, 1918, addressed a letter to the Acting Quartermaster General, refusing to accept the above notification as constituting a valid, legal, or effective cancellation or termination of the contract, in the following terms:

[C. Kenyon Company, Kenreign Weatherproofs, New York, Borough of Brooklyn.]

AUGUST 21st, 1918.

ACTING QUARTERMASTER GENERAL, U. S. A., C. & E. Division,
109 East 16th Street, New York City.

From: C. Kenyon Company, 754 Pacific Street, Brooklyn, N. Y.
Subject: Raincoat contracts Nos. 863, dated Sept. 7, 1917; 1381,
dated June 20, 1917; 1514, dated Oct. 22, 1917.

GENERAL:

1. This acknowledges receipt of your communication dated August 20, 1918, addressed to this company, and reading:

"This is to notify you that your contracts Nos. 863, dated September 7, 1917; 1381, dated June 20, 1918 (?); and 1514, dated October 22, 1917, with the C. & E. Division of the Quartermaster's Corps, for the manufacture of raincoats, is hereby canceled and terminated in accordance with the direction of the Secretary of War."

2. This company respectfully refuses to accept the foregoing notification as constituting a valid, legal, or effective cancellation or termination of the contracts mentioned; it hereby expressly protests against the attempt to cancel contracts referred to, and notifies the Government that there is expressly reserved by this company all of its rights under the contracts referred to, and any and every claim that it is entitled to in virtue of the provisions of said contracts, and that may accrue to it by reason of the attempted cancellation and termination thereof.

3. You are further respectfully informed that in complying with any directions heretofore or hereafter given by your department to this company in respect of the contracts mentioned, it expressly reserves all of its rights and such compliance is without prejudice thereto.

4. A copy hereof has been forwarded directly to the Acting Quartermaster General of the Army at Washington and to the Honorable Secretary of War.

Yours, very respectfully,

C. KENYON COMPANY,
By C. KENYON, Jr.,
Treasurer.

F. J. H.

L. C. S.

The claimant on the same date addressed a letter to the Secretary of War inclosing a copy of the above letter.

3. It appears that the above cancellation and termination, or attempted cancellation and termination of the contract mentioned in item 1, findings of fact, was caused by the fact that the contractor and some of its subordinates and employees had been indicted for frauds and were held to trial in the District Court of the United States for the Eastern District of New York; that the case was tried, and on the 8th day of November, 1918, there was rendered a verdict of "not guilty" as to each and every defendant, and the defendants were discharged.

4. On November 14, 1918, R. E. Wood, Brigadier General, Director of Purchase, directed a letter to Gen. W. H. Rose, Director of Purchase, a copy of which is as follows:

“ Nov. 14, 1918.

Memorandum for General W. H. Rose, Director of Purchase.

Please note attached.

The Kenyon Company has been acquitted and is now in good standing. I have notified Mr. Hogan, their attorney, that we will make settlement along the lines of circulars No. 111 and 112. They have been given a clean bill of health by the court.

R. E. Wood,

Brigadier General, Director of Purchase & Storage.

REW/jmr.

Incl.: Letter, Mr. Swope.

5. The Government officers having the matter in charge concluded from the facts above set forth that the contract had been broken by the action of the Secretary of War, that the damages were unliquidated and therefore could not be settled by adjustment and agreement, and undertook that the cancellation and termination of the contract issued by the Secretary of War (findings of fact 2) should be withdrawn and the contract reinstated, and thereupon, on November 18, 1918, the Secretary of War addressed to Brig. Gen. R. E. Wood, Acting Quartermaster General and Director of Purchase and Storage, the following letter:

NOVEMBER 18, 1918.

From: The Secretary of War.

To: Brigadier General R. E. Wood, Acting Quartermaster General and Director of Purchase & Storage.

Subject: Raincoat Frauds. Con. No. 863, 9/7/17; Con. No. 1381, 6/20/17; Con. No. 1514, 10/2/17.

1. Your letter of November 18, 1918, asking for directions to withdraw cancellation of the above contracts, is at hand.

2. You are hereby directed to withdraw cancellation of said contracts.

NEWTON D. BAKER,
Secretary of War.

6. It does not appear whether or not the contractor was notified of this attempted withdrawal of the cancellation, and thereafter, on November 20, 1918, the Secretary of War took the opinion of the Judge Advocate General as to the validity of such reinstatement if made, and was advised that the contract having been cancelled or terminated, there was no possible way for reinstatement other than making new contracts on the same terms, and that such new contracts would be illegal unless required in the interests of the United States; and also that the acquittal of the officers of the contracting company of offenses in connection with the contract was in no way

conclusive upon the question of the right of the Government to avoid the contracts for the reason upon which the action was based. And thereupon, on December 6, 1918, the Secretary of War addressed a memorandum to the Acting Quartermaster General, in the following terms:

DECEMBER 6, 1918.

Memorandum for acting quartermaster general:

Subject: Contracts of C. Kenyon Company.

1. Your recent memorandum raises the question as to whether the contracts of C. Kenyon Company, which were canceled by my direction on the occasion of the indictment of the officers of the company for fraud, should not now be reinstated.

2. I am advised by the Judge Advocate General that

"This office is clearly of the opinion that the contracts having been canceled or terminated as stated in your memorandum, there is now no possible way in which they can be reinstated other than by making new contracts on the same terms. Furthermore, such new contracts on the same terms. Furthermore, such new contracts could not be legally made unless they are required in the interests of the United States. It may be added that the acquittal of the officers of the contracting company of offenses in connection with these contracts is in no way conclusive upon the question of the right of the Government to avoid these contracts for the reason upon which such action was based."

In this opinion of the Judge Advocate General I concur.

NEWTON D. BAKER,
Secretary of War.

7. It appears also that the order of the Secretary of War, contained in item 2 of his memorandum to the Quartermaster General dated August 9, 1918 (findings of fact 2) directing the commandeering of the existing supplies, raw materials, partly manufactured materials, and completed raincoats was carried into effect by compulsory order under the authority of the act of Congress approved June 3, 1916, and with special reference to section 120 thereof, the compulsory order being dated August 27, 1918.

8. On June 28, 1919, the claimant filed its petition with this Board asking that a fair and equitable adjustment of its claim be made and that it be allowed and paid the amount found equitably due it on account of the cancellation of the contract. The precise amount of recovery claimed is not stated in the petition.

The only question considered by us is whether or not under the state of facts, the Secretary of War, or this Board, has jurisdiction to grant the relief asked.

DECISION.

1. This case comes to us only for the purpose of determining whether or not the contract referred to in item 1, findings of fact,

was terminated, and also whether or not this Board has jurisdiction of the claim presented for adjustment.

By direction of the Secretary of War a notice of cancellation and termination in unequivocal terms was sent to the claimant on August 20, 1918, which notice is set out in full in findings of fact (item 2). The claimant acknowledged receipt of the notice on August 21, 1918, but declined to accept the notification as constituting a valid cancellation or termination of the contract. The claimant, however, proceeded no further. The cancellation and termination of the contract was emphasized by the direction of the Secretary of War to the Acting Quartermaster General dated August 9, 1918, directing the commandeering in the hands of the claimant of raw materials, partly manufactured materials, and completed raincoats on hand, and by a compulsory order which was issued under such direction on August 27, 1918 (act of Congress approved June 3, 1916, sec. 120); the claimant contractor accepted the compulsory order and also did not offer or attempt to proceed under the contract until its termination by the lapse of time.

We hold that the action of the parties above set forth terminated the contract.

2. The Secretary of War under the act of March 2, 1919, has jurisdiction to adjust the claim presented, for the reasons that the contract described (item 1, findings of fact) is a proxy-signed contract and therefore not executed according to law. (Opinion of the Comptroller, 25th November, 1918.) The petition filed should be amended, or considered amended for the purpose of adjustment under the act in question.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Office of Director of Purchase, for appropriate action.

Col. Delafeld and Mr. Hamilton concurring.

Case No. 1692.

In re **CLAIM OF MT. HOPE FINISHING CO.**

- 1. PAYMENT.**—Where claimant has been paid after the filing of claim with this Board, the claim will be dismissed by this Board.
- 2. CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$1,428.65 for services in handling and caring for cotton duck. Held, claimant having been paid, claim will be dismissed.

Mr. Bayne writing the opinion of the Board.

This claim for \$1,428.65 is filed as a class A claim but properly belongs to class B. It arises upon instructions to proceed under a recommendation for an award of contract to claimant which was never in fact formally approved. The Claims Board in the Office of the Director of Purchase found there was no agreement under the Dent Act and claimant appealed to this Board.

There has been no hearing.

This Board finds and decides as follows:

1. On October 25, 1918, the cotton goods subdivision of the converting branch of the Clothing and Equipage Division of the Quartermaster General's Office, acting through Charles A. Rice, Chief of Branch, recommended an award of contract to claimant for dyeing and finishing 1,100,000 yards gray goods furnished by the Government to be delivered f. o. b. cars North Dighton, Mass.—350,000 yards spots; 87,500 yards weekly, beginning week ending November 2, 1918, and running throughout November; 100,000 yards weekly, beginning week ending December 7; to be completed by December 31; finished goods to be delivered within two weeks after receipt of gray goods; price 4½ cents per yard, net.

2. Between November 5 and November 12, 1918, the converting section, without waiting for formal approval of the award, or the issue of formal order or contract, shipped to claimant 2,357 bales of cotton duck, of which number 376 bales were dyed and finished by claimant and were paid for. At the time of said shipment claimant was informed by the Quartermaster General's Office, 109 East Sixteenth Street, New York City, that the recommendation had been made for the award as stated above, and claimant was instructed to proceed without waiting for formal document. The bales were shipped to claimant for the purpose of dyeing and finishing under the contract, proposed in the recommendation for award. Claimant accepted said 2,357 bales under said instructions and proceeded to carry out said contract.

3. After the armistice, further instructions were sent claimant to finish all materials which were in process in accordance with the proposed contract, but to suspend further work; all gray goods on hand and to arrive to be held in storage in the original packages awaiting further instructions. Claimant complied also with these instructions.

4. On January 16, 1919, claimant upon request returned 1,981 bales, the balance shipped to it, which were duly received by the Quartermaster's Office.

5. In pursuance of instructions from the Director of Purchase and Storage, and in settlement of its claim for damages for breach of said instructions to proceed with the proposed contract, an agreement was made with claimant by Capt. H. W. Campbell, Q. M. C., the officer in charge of the converting section of the depot inspection branch, with the approval of Maj. J. W. Blunt, officer in charge of the inspection branch of this depot, whereby the Government agreed to pay claimant a handling charge of 50 cents per bale, and a storage charge of 10 cents per bale per month, together with insurance charges amounting to \$41.95, aggregating in all \$1,428.65 for services actually rendered by claimant to the Government in attempting to carry out said instructions. Claimant was reasonably and fairly entitled to said amount.

6. Thereafter, and on or about May 17, 1919, said amount of \$1,428.65 was actually and duly paid to claimant by check No. 124147, after the filing of its claim herein.

DECISION.

1. Claimant having been fully paid for the amount to which it was entitled as found above, after the filing of its claim herein, now has no claim against the Government and accordingly its petition should be denied and the claim dismissed.

DISPOSITION.

An order should be made denying the relief prayed for by claimant in its statement of claim and dismissing the claim.

Col. Delafield and Mr. Hunt concurring.

Case No. 1670.

In re CLAIM OF F. A. CIGOL RUBBER COMPANY.

1. **CONTRACT SUBJECT TO APPROVAL.**—Where claimant made a formal contract with the Government, subject to the approval of the Surgeon General which was not approved by the Surgeon General, there is no binding contract between claimant and the Government.
2. **AGREEMENT MADE AFTER NOVEMBER 12, 1918.**—Formal contract and expenditures having been made after November 12, 1918, claim should be dismissed, as no relief can be granted under act of March 2, 1919.
3. **CLAIM AND DECISION.**—Claim is made for \$190.25 on a formal written contract, not approved by the Surgeon General as provided in the contract.

Mr. Bayne writing the opinion of the Board.

No hearing has been had on this claim.

1. Claimant made a formal agreement, F. M. S. D. No. 131, on November 13, 1918, subject to approval of the Surgeon General, U. S. Army, with Lieutenant Colonel M. A. Reasoner, Medical Corps, U. S. Army, for 10,210.84 pounds of rubber stoppers at 58½ cents per pound, delivered f. o. b. cars, Little Falls, N. J., to begin on or before November 23, 1918, and to be completed on or before December 28, 1918, with five days' notice termination clause, providing for payment of damages including depreciation or amortization of plant, facilities, and equipment.

2. The claim is for \$190.25 "on labor and material in process." The agreement was not approved by the Surgeon General.

3. The agreement not having been approved and having been made after November 12, 1918, the claim should be dismissed.

DISPOSITION.

An order should be made dismissing the claim of claimant and denying the relief prayed for in its statement of claim.

Col. Delafield and Mr. Hunt concurring.

Case No. 1772.

In re **CLAIM OF LORD & BURNHAM CO.**

- 1. INCREASED WAGES PAID BY SUBCONTRACTOR.**—Where claimant had a subcontract to do certain work upon a Government plant, and its contractor, in turn, had a contract for doing the work with the prime contractor of the Government, and during the progress of the work the prime contractor increased the wages of its employees, which caused claimant to increase the wages of its employees, there was no implied contract made by which the Government was obligated to pay claimant such increase of wages to its employees.
- 2. CLAIM AND DECISION.**—Claim filed under G. O. 103, but treated as a class B claim, for \$2,307.09 for increase of wages paid laborers. Held, claimant is not entitled to relief.

Mr. Harding writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Claimant filed an irregular statement of claim apparently based on G. O. No. 103 when apparently it should have been filed as a class B claim, if at all. The claim is for \$2,307.09, and is based upon its increased cost for labor while acting as a subcontractor, in the following circumstances:

United States Nitrate Plant No. 2 at Muscle Shoals, Ala., was erected by Air Nitrates Corporation, a corporation organized under the laws of New York, under formal written contract for the erection of the plant, as agent of the United States, dated November 16, 1917.

2. Westinghouse, Church, Kerr & Co. were subcontractors under the Air Nitrates Corporation in the erection of the chemical plant, industrial village, and allied work under a formal contract dated November 17, 1917.

3. The claimant, Lord & Burnham Co., was a subcontractor of Westinghouse, Church, Kerr & Co. for furnishing and installing sash operating devices under orders from Westinghouse, Church, Kerr & Co., numbered 135118, 6852, and 135842, at a fixed price of 30 cents per linear foot for labor of erection as well as other allowances made for material, traveling expenses, etc. The claimant began work on its subcontract in July, 1918, and finished it in May, 1919. During the progress of the work the labor situation was such that the prime contractor found it necessary or advisable to increase the

wages of labor in and about the work which it was performing, and this claimant in the performance of its subcontract also increased the wages of labor, but without having any agreement upon the subject with its prime contractor or direction from the Government. The item claimed for \$2,307.09 is the difference between the price of labor at the time of making its contract and what the labor actually cost in the performance of it. The claimant does not assert that it had any contractual relation whatever with the Government.

DECISION.

1. The Comptroller of the Treasury in Finance Circular No. 59, issued under date of May 19, decided as follows:

"Increases in wages occurring after the contract at a fixed price is made, do not furnish a basis for damages, nor does a decrease in wages require a reduction in price."

As testimony on its own behalf, the claimant, in a written communication dated November 22, 1919, to this Board, states in part as follows:

"You ask us to execute Form B as a supplemental statement of our claim as shown in Supply Circular No. 17, copy of which you enclose for us. In looking over this Form B, we believe that it hardly applied, for instance, we did not have any contract directly with any officer or agent acting under the authority, direction, or instruction of the Secretary of War, unless Westinghouse, Church, Kerr & Co., from whom we received the order for the work we did, could be considered as agent acting under the authority mentioned."

And again in a written communication dated December 4, 1919:

"In reply to your letter of December the 1st in reference to our claim in connection with work we did as subcontractors under Westinghouse, Church, Kerr & Co. at the U. S. Nitrate Plant No. 2, Muscle Shoals, Ala., * * * we wish to * * * state that while we received no authorization or direction from any representative either the Secretary of War or the President of the United States to increase rates which we were paying our men, we nevertheless were, as stated in our letter of November the 22nd, compelled to make such increases. We assume that if our contract had been on a percentage basis, that we would have received the same authorization or direction that undoubtedly Westinghouse, Church, Kerr & Co., and other contractors working on a percentage basis must have received, but unfortunately for ourselves, our contract was on a per unit price which made it unnecessary, as we see it, for authorization or direction to be given by any representative or Department of the U. S. Government."

2. The claimant itself nowhere asserts that it was in any contractual relation with the Government, and in fact all of its assertions and all of the files furnished in this case are conclusive to the point that no such contractual relation existed.

There was nothing in the contract of the subcontractor, claimant here, by which it could make any claim against its prime contractor on account of loss occurring through an increase of the cost of labor, and where such is the case the ruling of the comptroller above set forth is applicable. Added to this is the fact that there being no contractual relation between the claimant and the Government, there is no contract to be adjusted by this Board under the act of March 2, 1919, and the Board is without jurisdiction.

The claim must be disallowed.

Col. Delafield and Lieut. Col. Junkin concurring.

Case No. 1742.

In re CLAIM OF FISHER ELECTRICAL WORKS.

1. **SUBCONTRACTS—SUBCONTRACTOR, KNOWLEDGE AND CONSENT OF AN AGENT OF SECRETARY OF WAR—INCREASING FACILITIES.**—A subcontractor who, in anticipation of promised orders from prime contractors, which orders are not forthcoming because of the armistice, incurs expense in increasing the facilities of his manufacturing plant, is not entitled to an adjustment under the act of March 2, 1919, where neither the subcontract nor the installation of additional tools and machinery was with the knowledge or approval of an agent of the Secretary of War.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, of a subcontractor for tools and equipment required to fill promised orders by prime contractors, without the knowledge or approval of an agent of the Secretary of War. Held, claimant not entitled to relief.

Lt. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim of the Fisher Electrical Works, Detroit, Mich., is an appeal from a decision of the Claims Board, Air Service, United States Army, on a claim for \$11,357.86 based upon an agreement between the prime contractor and the claimant under the following circumstances:

(1) It appears from the record that during the months of August and September, 1918, the Cadillac Motor Car Co. and the Packard Motor Car Co. were operating under Government contracts Nos. 2266 and 1646, respectively, for the production of Liberty motors. These companies placed orders with the claimant for the manufacture of certain motor parts. Copies of these orders are attached to the file as Exhibits A, B, and C.

(2) It further appears that there were verbal promises upon the part of the Buick Motor Co. and the Lincoln Motor Co. for the placing of additional orders for the parts of the same character with the claimant, to be used by them in the manufacture of Liberty motors for the Government. These promises were based upon the ability of the claimant to produce. The orders with claimant for the parts to be manufactured for the Cadillac and Packard Motor

Car Co.'s were completed in part, and the remainder cancelled because of the signing of the armistice, and the cancellation on the part of the Government of the prime contractor's Government contracts. It appears that the verbal promises for future orders by the Lincoln Motor Co. and the Buick Motor Co. were cancelled for the same reason.

(3) Settlement agreements were entered into between claimant and its prime contractors, and in each case the claimant reserved the right to proceed against the Government for additional remuneration under the terms and provisions of the Dent Act. In making these settlements and accepting these payments the claimant alleges that it understood that it would receive further consideration by the Board of Contract Adjustment for its expenditures for machinery and special equipment. (Exhibit D.) The basis of settlement for special tools in the settlement agreement is alleged to have been as follows:

The tools were appraised, and after such appraisal in each case the amount corresponding to the percentage of each contract completed was deducted on the allowance for tools. (Claimant's Exhibit E.)

(4) The amount claimed appears to be the difference between the amount awarded claimant by its prime contractors and the alleged value of the tools and special equipment. The Air Service Claims Board disallowed this claim on the ground that there was no privity of contract between the United States and the claimant. An appeal was thereupon taken to this Board.

(5) The General Motors Corporation entered into a termination agreement with the Signal Corps, War Department, under contract No. 2266, and contracts amendatory thereto, as did also the Packard Motor Co. under contract No. 1646, and the Lincoln Motor Co. under contract No. 1647. Certified copies of these termination agreements attached to the files as Exhibits F, G, and H.

(6) An investigation of the files in the Office of the Auditor of Air Service Liquidation Board, and in the Office of the Zone Finance Officer, discloses that under these termination agreements vouchers were issued by the Government to the claimant in payment of its claims against the above-mentioned motor companies on orders under these contracts.

(7) It further appears that the preparation section of the Board of Contract Adjustment addressed a number of inquiries to claimant requesting that further information concerning evidence that might tend to show that an agreement between the claimant and an officer or agent acting under instructions or authority of the Secretary of War was entered into. In reply to these inquiries the claimant has

repeatedly stated that its contracts were with the prime contractors mentioned above, and that it had no contracts of any kind directly with the United States Government.

DECISION.

1. It is clear from the record in this case that the claimant was a subcontractor of prime contractors, the Cadillac and Packard Motor Car Cos., who held formal contracts with the Government. As such, the claimant was performing for the prime contractors, and not directly for the Government. The claimant does not contend that it had a contract with the Government. Neither does it contend that there was an understanding with Government officials with reference to the fulfillment of its orders for the prime contractors, nor for the procurement of additional facilities and expenditures it made in the preparation of its plant to take care of these orders.

2. In reply to inquiries from the Government's attorneys who had the preparation of this claim, for further information concerning any evidence that the claimant may have had tending to show that there was an agreement between the claimant and an officer or agent acting under instructions or authority of the Secretary of War, *the claimant has repeatedly replied that there was no such agreement.*

3. Under date of November 18, 1919, the claimant replied to an inquiry from Government counsel in part as follows:

"I have your communication of November 10, and you have stated clearly and concisely our relations with the Aircraft Department.

"As indicated in my previous letters, we had no contracts of any kind directly with the United States Government or any of its officers. All of our transactions were with prime contractors.

4. Section 4 of the Dent Act reads in part as follows:

"That whenever under the provisions of this act the Secretary of War shall make an award to any prime contractor with respect to any portion of his contract which he shall have sublet to any other person, firm, or corporation who has in good faith made expenditures, incurred obligations, rendered service, or furnished material, equipment or supplies to such prime contractor, *with the knowledge and approval of any agent of the Secretary of War duly authorized thereunto*, be for payments of said award, the Secretary of War shall require such prime contractor to present satisfactory evidence of having paid said subcontractor or of the consent of said subcontractor to look for his compensation to said prime contractor only.

5. The record discloses and the claimant admits it was performing contracts with its prime contractor without the knowledge and approval of any duly authorized agent of the Secretary of War. The Board is, therefore, of the opinion that the Secretary of War is with-

out authority to grant this claimant relief under the act of March 2, 1919.

6. For the reasons stated, therefore, the decision of the Air Service Claims Board denying relief is upheld, and the claim of the petitioner is dismissed.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits the decision to the Air Service Claims Board for proper action in accordance with this decision.

Col. Delafield and Mr. Bayne concurring.

Case No. 1522.

In re CLAIM OF MANNING, MAXWELL & MOORE (INC.).

1. AUTHORITY TO CONTRACT—ONE DIVISION ACTING FOR ANOTHER.—

Where it is established that there was an understanding between the Procurement Division and the Production Division of the Ordnance Department that the latter should act as the representative of the former in a program for increased facilities for the manufacture of pistols, urgently required, the action of the Production Division will be deemed to be the action of the Procurement Division as well.

2. INCREASED FACILITIES.—Where the Production Division, acting for itself, as well as for the Procurement Division, induces a pistol manufacturer to increase its facilities preparatory to taking on large contracts for the manufacture of pistols, and the manufacturer complies with said request, and the orders are not placed by reason of the armistice, there is an agreement on the part of the Government within the purview of the act of March 2, 1919.

3. CLAIM AND DECISION.—Claim is made under the act of March 2, 1919, for \$334,828.18, for increased facilities for making pistols. Held, claimant is entitled to recover.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed with this Board under Purchase, Storage and Traffic Supply Circular No. 17 (1919), by reason of an agreement alleged to have been entered into with a representative of the Secretary of War.

The claimant is a manufacturer of and dealer in machinery.

The claim is on account of expenditures made and obligations incurred by claimant to comply with an oral agreement alleged to have been entered into between claimant and a representative of the War Department to provide certain special machine tools for the manufacture of Colt .45-caliber pistols for the United States Army, in accordance with the 1918 pistol requirement Schedule No. 10544 of the Ordnance Department.

This claim was heard at the same time with the claims of the Cincinnati Milling Co., No. 549, and Pratt & Whitney Co., No. 594, which arose out of the same state of facts. Testimony relating to all three claims was taken at the same hearing, and it was agreed that the testimony of all witnesses and all other evidence in the three cases should be considered in all three claims as far as applicable to each.

STATEMENT OF FACTS.

1. Some time prior to July, 1918, the Estimates and Requirements Division of the Ordnance Department transmitted the 1918 pistol schedule to Maj. Hayden Eames, chief of the small-arms section, Production Division, Ordnance Department, for his action. This schedule called for some 4,900,000 pistols to be delivered by December 31, 1918. This requirement, it appears from the evidence, was far beyond the existing capacity of pistol manufacturers in this country. Compliance with its terms required special equipment of additional factories and the supplying of increased manufacturing facilities to existing factories. This pistol program was, therefore, what was known as an "increased facilities program," and required the utmost haste and extensive cooperation of War Department officials and contractors for its due completion.

2. In July, 1918, Mr. Percy M. Brotherhood, vice president of claimant company, had an interview in Washington with Maj. Eames and Capt. H. T. Martin, chief of the weapons section of the small arms section, who was Maj. Eames's assistant.

At this interview they impressed on Mr. Brotherhood the necessity for haste, and while they did not feel in a position to place a final order because the appropriation for the pistol schedule was not at that time finally approved, Maj. Eames asked him to go ahead with his preparations to secure the tools in reliance on the assurance that formal order would be issued later in due course.

Maj. Eames testified as to this interview in July (Testimony, pp. 73-74):

"With these enormous requirements for pistols confronting us I naturally turned to Mr. Brotherhood as a man presumably being up to date with the machine parts to assist us in obtaining these machines. We turned to Mr. Brotherhood at the time to function to procure to locate these tools and I did everything that I could at the time to inspire him to go ahead and dig them up.

"Q. Specifically, what instructions or authority did you give him?

"A. To see Capt. Martin and see what was required and go after it.

"Q. In making your contracts with the pistol people or endeavoring to make them, you led them to infer that when you told them they would have a contract that was binding in every way you did your best to assure them they would get the order?

"A. I certainly did. My experience justified me in believing my recommendation would go. (p. 87).

"Q. You tried to bind the Government, didn't you?

"A. I certainly did. I had every intention of having him go ahead (p. 86)."

On September 7, 1918, Capt. Martin, on behalf of Maj. Eames, prepared and transmitted to the plant section, Production Division, a letter containing a list of tools that would be required for the pistol

manufacture, with instructions as to the part to be played by the plant section in their production. This letter is in evidence as claimant's Exhibit A. It contains the statement that—

“The plant section would work in close conjunction with the Procurement Division, miscellaneous section, to place the order for these machine tools.”

3. About September 24, 1918, Mr. Brotherhood asked Capt. Martin for precise instructions as to the tools, and Capt. Martin referred him to the plant section of the Production Division for details of prices and deliveries.

The result was an interview on September 27, 1918, between Mr. Brotherhood and Lieut. Robert Coleman, of the plant section, and Private T. J. Myers, his assistant, who had been given charge of this pistol program in the office of Capt. Turner, of the plant section. Maj. Eames testified:

“The function of the plant section was to actually get this machinery when we sent them the list of what had to be gotten (p. 85).”

4. At this interview Mr. Brotherhood, Lieut. Coleman, and Sergt. Myers checked over together and agreed on the list of machine tools that claimant was to secure and on prices and deliveries. This list as stated above had already been prepared by Capt. Martin on September 7, 1918, under the direction of Maj. Eames and transmitted by him to the plant section. These are the tools covered by this claim. At this interview Lieut. Coleman and Sergt. Myers told Mr. Brotherhood that they would recommend these tools to the Procurement Division for purchase and that their recommendations were always followed.

5. On November 5, 1918, Lieut. Coleman wrote to claimant a letter, which is in evidence, containing the following statement:

“The procurement order number for these machines will be issued this week, together with definite shipping instructions.”

6. Mr. Brotherhood accepted the statements made to him by Maj. Eames as an order for the machine tools, and agreed to furnish them, and claimant proceeded before November 12, 1918, to make the expenditures and incur the obligations to procure the tools on which the claim is based.

No formal order for the tools was ever issued to claimant and no contract signed. In the latter part of November, 1918, claimant was notified that the program was abandoned and suspended its operations.

7. It appears from the evidence that all of the negotiations on which an agreement of any kind between claimant and the Ordnance Department could be based were had by claimant with officers in the Production Division of that department. This division was not

specially charged with the duty of entering into contracts, which was the function of the Procurement Division. Claimant does not deny that it knew this, but relies on what it claims was a practice in the Ordnance Department in accordance with which this distinction was not strictly enforced, but negotiations were frequently conducted in the first instance by the Production Division, which in fact issued orders to contractors to proceed, and whose action in this respect was acquiesced in and was approved later by the Procurement Division by the issuance of formal orders and contracts as a matter of course and routine. That, in addition to this, in the particular instance of this pistol program, not only was this general practice followed, but claimant was led by officers in both divisions to believe that the two divisions had agreed that the Production Division was to place orders for the pistol machinery on behalf of the Procurement Division, and that the Procurement Division would sustain this action in its behalf by carrying out the recommendations of the Production Division. That under these circumstances claimant was justified in regarding the instructions of the Production Division to proceed as an order and sufficient authority to provide the tools and in proceeding to incur obligations for that purpose on the strength thereof.

8. The material evidence in support of this position of claimant is summarized in the following statement of Lieut. Coleman:

"I would like to have five minutes to explain that situation. It was, as I explained, the function principally of the plant section had to do only with those contracts requiring additional facilities. The machine-tool program then, the manufacture of shell and pistols, was an increased facility. We had a list sent from the General Staff with the number on and the size of shell required, and we worked the schedule of the size and the type of tool required to follow this definite program in addition to what was already in existence. We knew where we could go to get capacity, and the General Staff gave us instructions to go ahead and secure capacity for this. Gen. March, Col. Hitt, and the whole crowd were at a conference in the general's office. We got it all done prior to September. He got the representative from the Procurement Division, Mr. Hall, representative from the Estimates and Requirements, whose name I forget at this time, a representative of the plant section, in fact there were two—Capt. Turner and Col. Eames—they were all principally people interested in actually seeing these orders expedited. We had Mr. Hall in, who is a representative of Procurement. We put our recommendations through and everybody concurred on the subject, so it was absolutely positive that orders would be placed with that person because the representative of the Procurement concurred with us. That was done as a committee. Mr. Hall knew exactly what recommendations we made.

"There was a gentlemen's understanding that they were to concur with us. If they disagreed on one point, we fought it out there, and Plant understood that Procurement would back it up (p. 211-213)."

This testimony of Lieut. Coleman as to the agreement between the two divisions is corroborated by Gen. Jameison, who is stated in the testimony to have been Chief of the Production Division and Assistant Chief of Ordnance, in a letter to this Board, dated September 23, 1919, in the record in the following language:

“ With reference to your paragraph as to the function of the plant section, I am under the impression that the position of the plant section in connection with the negotiation will be clarified by giving you the information that a representative of the Procurement Division, together with a representative of the Requirement Division and the representative of the plant section, constituted a committee to pass simultaneously at a meeting each day on any project the plant section had to recommend for the procuring of tools to fill the requirements of the General Staff, and that this committee was formed in order that the manufacturers might be given definite information as to the probability of their securing the order and advised as to whether or not the plant section intended to recommend that they would get the order, so that the steps taken by the Procurement Division and the Requirement Division to complete the transaction should be matters of form and not of substance.”

Mr. Brotherhood testified that he understood the existence and purpose of this agreement and the practice of the two divisions pursuant to it, and that in proceeding with his production of tools he acted in reliance on this understanding.

DECISION.

1. Regardless of the question whether there was any general practice in the Ordnance Department by which contracts were entered into and orders issued by the Production Division with the acquiescence and approval of the Procurement Division the evidence in this case clearly justifies the conclusion that there existed an agreement between the two divisions to the effect that for the specific purpose of carrying out this particular pistol program the Production Division was to make arrangements, on behalf of the Procurement Division, with contractors for starting production at once without waiting for formal contracts or procurement orders and that the Procurement Division would sustain the action of the Production Division in this respect by approving its recommendations; that this understanding had been reached because this was an increased facilities program, required unusual haste and special tools for its execution, and because the Production Division was considered by both divisions as the better equipped and prepared of the two divisions to place orders in this particular line of business in such a way as to secure prompt results.

This agreement with the Procurement Division, whose contracting power is conceded, was known to both contractors and the Govern-

ment officials. It is sufficient to sustain the action of the Production Division officers in the case of this pistol program as the authorized action of the Ordnance Department to the extent of securing tools to manufacture these pistols and justified contractors in relying in good faith thereon, and in regarding as authorized orders of the War Department and as the basis of valid contracts the requests of officers of the Production Division and statements by them that they had recommended the purchase of tools made by those officers for the specific purpose of inducing manufacturers to proceed to secure or manufacture such tools without awaiting the action of the Procurement Division.

2. The evidence in this claim shows that the above relation between the two divisions existed at the time of and covered the transactions involved in this case. It shows further that claimant knew of its existence, that Maj. Eames of the Production Division did request claimant to proceed at once to procure these tools for the pistol program, that claimant accepted and acted on this request in good faith in reliance on the relations between the divisions, and that it incurred expenditures and obligations prior to the armistice on the strength of Maj. Eames's request.

3. The evidence shows, therefore, an agreement between claimant and an officer or agent acting under the authority or direction of the Secretary of War, on the faith of which claimant made expenditures or incurred obligations prior to November 12, 1918, within the terms of the act of March 2, 1919.

DISPOSITION.

1. Document and certificate, Form C, will issue.

Col. Delafeld, Lieut. Col. Junkin, and Mr. McCandless concurring.

Case No. 1512.

In re CLAIM OF THE HAWKSBILL CANNERY.

1. **NO LOSS SUSTAINED.**—Where a canner is instructed to retain 40 per cent of its product for the use of the Army, and upon cancellation of such instructions, sells its product at a higher price than that fixed by the Government, claimant has suffered no loss and, therefore, is not entitled to relief under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for reimbursement for expenses incurred as a result of a written order to retain 40 per cent of claimant's product for the use of the Army. Held, claimant is not entitled to relief because it suffered no loss through the Government's failure to accept the goods.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim. Statement of claim on Form A has been filed under Purchase, Storage and Traffic Supply Circular No. 17 for \$1,589.08, on an agreement alleged to have been entered into between the claimant and the United States.

2. On October 4, 1918, claimant wrote the depot quartermaster at Baltimore that it had approximately 5,000 cases of string and stringless beans packed for the season, and inquired what percentage it must retain for the use of the Army. The depot quartermaster replied, directing claimant to hold 40 per cent.

3. On November 30, 1918, the depot quartermaster wrote the claimant that it was released from furnishing any of its pack for the Army.

4. Claimant fixed its cost of production at \$1.01 per dozen cans. This was accepted and 13 cents per dozen profit added, thus fixing the price to the Government at \$1.14 per dozen cans.

5. Claimant held for the Government 2,384 cases of two dozen cans each, making the contract price to the Government \$5,435.52.

6. In December, 1918, claimant sold a part of the beans held for the Government at a net price of----- \$3,791.53
In May, 1919, it sold the remainder at a net price of--- 2,044.79

Total amount received from 2,384 cases----- 5,836.32
7. It claims, by way of allowance for labor, insurance,
and storage----- 330.06

It realized a net total of----- 5,506.26

8. The sum received for the portion of the claimant's pack held for the United States is \$70.74 in excess of the contract price to the Government.

DECISION.

Claimant had a contract with the United States under which it was entitled to reimbursement for any loss by reason of the Government's failure to accept the goods contracted for. It sustained no loss but made a profit. It is, therefore, not entitled to damages.

DISPOSITION.

An order will issue denying relief.
Col. Delafield and Mr. Williams concurring.

Case No. 2216.

In re CLAIM OF AMERICAN CAN CO.

1. **PROSPECTIVE PROFITS.**—Prospective profits can not be recovered upon the uncompleted portion of an informal contract with the Government, which has been suspended.
2. **AUTHORITY TO CONTRACT.**—Where a claimant seeks to recover upon an informal War Department contract which is alleged to have been made on behalf of the Government by an inspection officer of the Navy Department, and claimant well knew such officer did not have authority to contract, no contract was made within the act of March 2, 1919.
3. **NEGOTIATIONS MERGED IN WRITTEN CONTRACT.**—Where claimant and its subcontractor had negotiations with Government officers, which terminated in the making of a formal contract between claimant and the subcontractor, for the manufacture of a certain number of articles by the subcontractor for the War Department, and during said negotiations statement was made by an officer of the Navy Department that he felt sure that claimant would get additional orders for making a larger quantity of said articles, the negotiations were merged in the written contract, and no implied contract was made to manufacture a larger number of the articles, and in making expenditures in expectation of getting such larger orders claimant assumed an ordinary business risk.
4. **CLAIM AND DECISION.**—Claim is made under act of March 2, 1919, for \$37,306.57 for facilities. Held, that claimant is not entitled to relief.

Lieut. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACTS.

The Board finds the following to be the facts:

1. The claim of the American Can Co., New York, N. Y., based upon an alleged agreement with the Government for the manufacture of 631 Mark XIV firing locks was originally filed with the District Ordnance Claims Board of Bridgeport, Conn. It was later referred to the Ordnance Claims Board, Washington, D. C., and from there to the War Department Claims Board, Purchase, Storage and Traffic Division, and thence to this Board for determination as to whether or not there was in fact an agreement between the agent of the Government and the claimant in this case, whereby the claimant was to manufacture 631 firing locks for the Government.

2. The case came up for a hearing before this Board on December 17, 1919, and from the evidence adduced at the hearing it developed that the claimant had been paid by the District Ordnance Claims Board of Bridgeport the sum of \$45,000, which was considerably

greater than the amount specified in the papers before the Board, and which claimant's representative, Mr. Foster, testified was the final amount of the claim which it had against the Government. It would, therefore, appear that in view of this fact the claim must be dismissed.

3. However, after a careful review of all papers in connection with the transaction and the testimony adduced at the hearing from the claimant's secretary and from naval officers concerned, it would appear that there was no agreement within the meaning of the terms of the Dent Act whereby the Government is under obligation to reimburse this claimant for any expenditures that may have been made upon the faith of same.

4. The facts as they appear in the record and testimony are substantially as follows:

The American Can Co., of New York, was representing the Government in the management of one of the Government's plants, the Liberty Ordnance Works, of Bridgeport, Conn. The Navy Department placed an order through the Ordnance Department of the War Department with the American Can Co. for the manufacture of 369 firing locks. The American Can Co. was not in a position to manufacture the firing locks, and it therefore became necessary for it to place the contract with a subcontractor. It began negotiations with the H. W. Cotton Co. (Inc.) with a view to placing a contract for the 369 firing locks. It appears that a conference was held on August 29, 1918, between officers of the American Can Co., officers of the H. W. Cotton Co. (Inc.), Lieut. Anderson, of the Ordnance Department of the War Department, and Lieut. Farrell, of the Navy, at which time the proposition of placing a contract with the H. W. Cotton Co. (Inc.) was discussed. Mr. Cotton represented that he would be unable to take a contract for 369 firing locks unless he was assured that he would be given an additional order which would make a total of at least 1,000 of these locks. Claimant alleges that Lieut. Farrell, of the Navy, who was the inspecting officer of the ordnance materials of the Navy, informed Mr. Cotton that he felt sure that an additional order would come through of sufficient size to give him a contract for at least 1,000 of these firing locks to manufacture. It appears that Mr. Cotton was then willing to undertake the manufacture of the order for 369 firing locks. On September 24, 1918, a formal contract was signed between the American Can Co. and the H. W. Cotton Co. (Inc.), whereby the American Can Co. was to be furnished with 369 firing locks. The contract also contained a cancellation clause which provided that upon certain conditions the Government could terminate the order. There was also inserted in this contract a provision which gave the American Can Co. the op-

tion of placing additional orders with the H. W. Cotton Co. (Inc.), which is quoted as follows:

"Eighteenth: The buyer may from time to time during the performance of this contract place additional contracts with the seller for such quantities of firing locks and spare parts as may be desired by the buyer, and said additional contracts shall embody the same terms and conditions as are embodied herein, except that deliveries thereunder shall be at the rate of at least fifty (50) firing locks and proportionate number of spare parts per week from the completion by seller of deliveries theretofore contracted for by the parties hereto hereunder, and buyer agrees to execute and perform such contracts."

5. The H. W. Cotton Co. (Inc.) proceeded with preparations to fulfill the contract for 369 firing locks. At a subsequent date Admiral Earle, of the Navy, wrote a letter to the War Department, Ordnance Department, requesting that an additional order be placed with the H. W. Cotton Co. (Inc.) for 631 firing locks. This letter, however, never went forward to the American Can Co. nor to the Cotton Co. It was simply a request from the Ordnance Department of the Navy to the Ordnance Department of the War Department, requesting that such an additional order be placed. The Ordnance Department never took action on Admiral Earle's request.

6. It appears that the claimant's subcontractor, the H. W. Cotton Co., did not make any deliveries on the original contract prior to January, 1919. The Government did not take advantage of the cancellation provision after the armistice was signed, but permitted claimant's subcontractor to fulfill the original order, which order was finally completed in the latter part of 1919, and the H. W. Cotton Co. (Inc.) has been paid in full for that contract.

OPINION.

1. The subject matter of this claim is for extra facilities and additional expenditures that were made by the H. W. Cotton Co. (Inc.), in anticipation of an order for 631 firing locks. Also an item of about \$23,000, for anticipated profits. This Board is unable to find that there was an agreement between the claimant company and the Government or the claimant's subcontractor, the H. W. Cotton Co. (Inc.), whereby the Government is under obligations to reimburse it for expenditures that it made. Lieut. Farrell, of the Navy, was only an inspecting officer—his duties were those of inspecting ordnance and to see that manufacturers were complying with the specifications in their contracts and that the material was according to the requirements and satisfactory in every respect. He was not a contracting officer; he was not a negotiating officer; neither did he

hold himself out as such. It appears that all parties knew of the duties of this naval officer and knew that the order had to come through the War Department in this particular instance. Lieut. C. A. Anderson, of the Ordnance Department, was present at the conference of August 29, 1918, but had nothing to say in the conversation that took place. He did, however, sign the written contract which was later drawn up for the 369 firing locks. Even if Lieut. Farrell's parol statements on August 29 could have been construed as binding upon the Government, and it is not admitted that he made statements which would bind the Government, since the written contract for 369 firing locks, which was subsequently signed by the parties concerned, did not provide for the additional order of 631 of these locks, but merely made it optional upon the part of the Government to place further orders if it so desired, it must be presumed that all prior oral negotiations were merged into the subsequently written instrument. Claimant signed the written instrument and made no complaint that it did not represent its original oral understanding. (*Union Mutual Life Ins. Co. v. Mowry*, 96 U. S., 544.) The written instrument constituted the contract and all prior negotiations were merged into it and were satisfactory to both parties concerned. It therefore follows that whatever additional expenditures and extra equipment that this claimant secured was made at its own risk and not upon the Government's request. The H. W. Cotton Co. (Inc.) was taking an ordinary business risk when it proceeded to secure this material and make these expenditures, not upon the faith of any specific agreement, but upon the anticipation of future orders. Doubtless, if the war had continued the H. W. Cotton Co. (Inc.) would have secured additional orders, but that was a contingency that no one could foresee and in the absence of any express or implied agreement upon the part of the Government to place this additional order, whatever loss the H. W. Cotton Co. (Inc.) may have sustained can not be charged to the Government.

2. With reference to the anticipated profits, this Board has never held that a claimant is entitled to anticipated profits upon suspended part of informal contracts.

3. The act of March 2 is quoted in part as follows:

"*Provided*, That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States."

4. The law does not permit anticipated profits upon suspended parts of informal contracts, and even if claimant had an agreement with the Government to manufacture the 631 firing locks and the

order was later suspended it would not be entitled to its profits on the suspended portion of the order.

5. For the reason stated, therefore, the relief sought for is denied.

RECOMMENDATION.

1. It is therefore recommended that if settlement has been made with this claimant and its subcontractor upon the basis that an agreement was entered into between the Government and the claimant and its subcontractor, the H. W. Cotton Co. (Inc.), for the manufacture of 631 firing locks, such settlement is in error, and whatever payment may have been made upon such a basis of settlement should be recovered by the Government.

DISPOSITION.

1. The papers in this decision will be forwarded to the Ordnance Claims Board for proper action in accordance with this decision.

Col. Delafield and Mr. Bayne concurring.

Case No. 1172.

In re **CLAIM OF RAJAH AUTO SUPPLY CO.**

- 1. REIMBURSEMENT FOR EXPENDITURES IN ANTICIPATION OF CONTRACT.**—In the absence of an agreement, a claimant is not entitled under the act of March 2, 1919, to reimbursement for expenses incurred in anticipation of a contract. The fact that claimant, while performing an existing contract, was urged by a Production officer to make prompt deliveries in order to secure future orders, is no basis for an implied agreement, nor is the mere fact that claimant at its own solicitation was given priority orders to facilitate purchase of machinery.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral agreement relating to the manufacture of spark plugs. Held, claimant is not entitled to relief.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

The claimant's statement of claim alleges that upon faith of representations of Capt. J. J. O'Brien, jr., spares engine production section, Bureau of Aircraft Production of the Army, that the claimant would receive additional business beyond the contracts then being performed by it, it purchased a quantity of porcelain insulators to the extent of 140,000 in excess of the amount necessary for the performance of its existing contracts and also purchased at the same time certain machinery necessary for the performance of the anticipated business. The claimant asks that the United States compensate it for the difference between the costs and present value of said insulators.

A hearing was had at which an opportunity was afforded the claimant to submit evidence to support its claim. The claimant was informed at the conclusion of the hearing (Dec. 29, 1919) that if it desired to submit further evidence it would be received and considered. (Rec., p. 9.) No further evidence having been submitted at the date of this decision, it will be assumed that the claimant does not desire to submit further evidence.

FINDING OF FACTS.

The Rajah Auto Supply Co. is the manufacturer of "Rajah Pasha" spark plugs for automobile and airplane motors. On June 11, 1917, it entered into a contract with the United States for the

delivery of 40,000 plugs, which quantity was reduced to 35,000 on July 10, 1918. This agreement is evidenced by Government order No. 8250. This contract was completed May 7, 1918, and the plugs delivered and paid for by the United States.

On May 6, 1918, the claimant entered into a contract evidenced by order No. 30975 for 50,000 plugs. It appears that this contract was completed and the plugs delivered and paid for by the United States on or about September 18, 1918. (Letter of H. R. Bunten, general manager of claimant company, dated Nov. 3, 1919, p. 3.)

It appears that the claimant company purchased in May, 1918, some 240,000 porcelain insulators for spark plugs, which quantity was in excess by 140,000 of the number necessary for the performance of its then contracts.

Early in September, 1918, Mr. Gregory Flynn, at that time a duly authorized representative of the E. A. Cassidy Co., of New York City, which company was the agent of the Rajah Auto Supply Co., called upon Capt. O'Brien at the office of the Director of Aircraft Production at Washington, and stated to him that order No. 30975 was about to be completed and inquired if the Rajah Co. might expect to receive an additional order for its plugs. Capt. O'Brien stated to Mr. Flynn that arrangements had been made to provide spark plugs for Curtiss, Hall-Scott, and certain other airplane motors, but that he was at that time endeavoring to secure spark plugs suitable for Hispano-Suiza motors. Mr. Flynn informed Capt. O'Brien of flying tests which in his opinion tended to prove that the Rajah plugs were suitable for Hispano-Suiza motors. Capt. O'Brien replied that before he could place an order with the claimant for its plugs, approval of the chief inspector, Mr. Roger Chauveau, would have to be secured. Mr. Flynn then called upon Mr. Chauveau, who stated that before he could recommend the purchase of Rajah plugs for said motors, a dynamometer test of the said plugs in connection with the said motors must be had at the Wright-Martin factory, New Brunswick, N. J. Mr. Chauveau at once requested the person in charge at the said factory to arrange for this test. Delay in the arrangements occurred, and during this delay the armistice was signed, November 11, 1918. (Letter of Mr. Gregory Flynn to this Board, dated Nov. 13, 1919.)

Capt. O'Brien at the hearing testified that he served in the Production Department of the Bureau of Aircraft Production, spares engine production section, in May, 1918, and at the times set forth above. It was his duty to collect data as to the abilities of contractors and the quality of their product and to determine upon recommendations for the placing of orders for particular quantities with particular contractors. These recommendations were made to the procurement section for its appropriate action. At the time the con-

tract of May 6, 1918, was entered into Capt. O'Brien urged Mr. Flynn to "get busy; show the Production Department that they could deliver in accordance with the contract, and without doubt there would be additional business placed with them in the near future." (Testimony of Capt. O'Brien, Rec., p. 3.)

There is no evidence that the claimant in anywise was directed to purchase any greater quantity of insulators than was necessary for the performance of the said contracts numbered 30975 and 8250. (Capt. O'Brien's testimony, p. 2.)

It further appears that in order to increase its production the claimant company desired to purchase two automatic lathes, four-spindle type, and that it requested the assistance of Capt. O'Brien toward securing a priority order therefor. It appears that Capt. O'Brien did assist in the procurement of this priority order and that priority certificate No. P-108836 was issued by the Priorities Committee of the War Industries Board under date of September 14, 1918. Capt. O'Brien was unable to recall any conversation on his part wherein he in anywise authorized the purchase of said equipment on behalf of the United States. (Rec., p. 3.)

It also appears from the record that the claimant company was diligent in the performance of its contracts and had earned the favorable comment of Government officers.

DECISION.

There is no evidence of any agreement between the United States and the claimant except orders No. 8250 and No. 30975, which orders had been performed and the articles accepted and paid for by the United States.

DISPOSITION.

An order denying claim will be entered.
Col. Delafield and Mr. Harding concurring.

Case No. 90.

In re CLAIM OF S. STROOCK & CO.

1. **MATERIAL ON HAND HELD FOR NEW CONTRACT.**—Where claimant was performing Government contracts and was asked to take another contract for 40,000 yards of chevron backing felt, and to enable it to take this contract, claimant was relieved of further performance of one of its other contracts, and an award was made for the new contract, and claimant retained sufficient material to perform the new contract, claimant will be entitled to recover loss on material so retained.
2. **CONTROL BY WAR INDUSTRIES BOARD.**—In such a case, especially is claimant entitled to recover in view of the fact that the War Industries Board had virtually assumed control of claimant's material and he could not dispose of it.
3. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$7,037.86 for loss on commitments retained to perform a Government contract, for which an award had been made. Held, claimant is entitled to recover.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$7,037.87, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. S. Stroock & Co. is a partnership. Mr. Sylvan I. Stroock is one of the partners and in 1918 was connected with the War Industries Board and had charge of what was called the felt section. The partnership has a large plant at Newburgh, N. Y., and is one of the important manufacturers of felt in the United States.

3. In May, 1918, Mr. Sylvan I. Stroock called a meeting of all the felt manufacturers in the United States to be held at the office of S. Stroock & Co. in New York. All the manufacturers were represented at this meeting. It was held on May 17, 1918. Mr. Sylvan I. Stroock stated at this meeting in substance that the requirements of the Government for felt were so large that it had been decided to take measures to insure as far as possible that the needs of the Government should be met. He delivered to the claimant and to each of the other manufacturers a letter from the War Industries Board, signed by himself, which was to the effect that the Government assumed a certain control over the felt industry and that no contracts

could be made between the manufacturers and civilians without the consent of Government representatives. The Government also had control over wool and clippings and such other materials as entered into the manufacture of felt. All of the manufacturers agreed to abide by the terms of the letter of May 17, 1918, and S. Stroock & Co. wrote a letter to the War Industries Board shortly afterwards in which it stated that it agreed to abide by the provisions of the letter of May 17.

4. S. Stroock & Co. were engaged during 1918 in the performance of Government contracts for many different kinds of felt, including one dated May 2, 1918, calling for the manufacture of 240,000 yards of interlining felt.

5. Mr. D. A. Smith, in September, 1918, assumed the duties of procuring felt for Government purposes. He was chief of the felt section, and his title was that of felt buyer. On October 21, 1918, he received a requisition from the department for 100,400 yards of chevron backing felt. On the same day he applied to the War Industries Board for a permit to buy the felt, which was granted October 23, 1918. He advertised for bids, although he was authorized to buy without advertising, and received responses from the claimant and others. The capacity of the felt manufacturers of the United States was at that time not sufficient to meet the requirements of the Government. The claimant stated to Mr. Smith that if it was to enter into a contract for 40,000 yards of backing felt as desired it would be necessary for it to be relieved in respect to its obligations under some other contracts. It was accordingly arranged between Mr. Smith and the claimant that the contract of May 2, 1918, calling for 240,000 yards of interlining felt should be modified by a supplemental agreement reducing the number of yards to be delivered. Such a supplemental contract was prepared and executed by the claimant and the United States, and the number of yards of interlining felt was reduced to 113,818½ yards. Mr. Smith then decided to place an order with the claimant for 40,000 yards of chevron backing felt in accordance with its bid and on November 7, 1918, he gave notice to the claimant of an award to it of a contract for 40,000 yards of No. 2 chevron backing felt at \$2.30 per yard f. o. b. Newburgh.

6. There had been some negotiations between Mr. Smith and the claimant in respect to a contract for No. 1 facing felt, and the claimant had made some quotations of prices at which it would be willing to manufacture this class of felt. The claimant was engaged to its capacity in the manufacture of felting for the Government, and it appeared that if an award were made to it for the No. 1 facing felt it could not accept the contract for the No. 2 chevron backing

felt. The award to the claimant was therefore for the No. 2 chevron backing felt only.

7. Mr. Smith was responsible for the supply of all kinds of felt, and his decision was final in the matter of felt purchases. A memorandum of the terms of the contract was drawn up by Mr. Smith, and in accordance with the practice of the department the memorandum was sent on to the contract section for the purpose of having a formal written contract prepared. Before the contract was drawn up the armistice was granted, and further performance of the claimant's contracts was suspended.

8. The claimant had on hand on November 7, 1918, clippings and wool which were suitable for the manufacture of the chevron backing felt in accordance with the specifications of the award of that date. These materials were obtained originally from Government sources, and were largely the result of changes in the specifications of other Government contracts.

9. When the performance of the various contracts of the claimant was suspended the officers of the Government examined the materials which the claimant had on hand and determined what materials were adapted for the performance of the several contracts and allocated to each of the suspended contracts such materials as were adapted to the manufacture of the articles called for. The officers allocated to the contract for 40,000 yards of chevron-backing felt, which was the subject of the award of November 7, 1918, certain suiting clips and worsted clips and wool, totaling 32,123 pounds. The bureau board at New York determined the amount to which the claimant was entitled in respect to the loss on these materials if it was entitled to anything, and in doing so followed the rules that had been adopted by the department for adjustments in respect to materials of the kinds which the claimant had on hand. This amount as fixed by the bureau board is \$7,037.86. This is less than the amount first claimed by the contractor but it has indicated its assent to the determination of the bureau board.

DECISION.

1. The award to the claimant of the contract for 40,000 yards of chevron-backing felt, as evidenced by letter of November 7, 1918, was an acceptance of claimant's written offer of November 6, 1918, and Mr. Smith, in making the award, was acting within the scope of his duties as felt buyer. The claimant had in its possession on November 7, 1918, suitable clippings and wool which had to a large extent been purchased for the performance of other Government contracts, one of which was modified so as to enable it to perform the agreement for chevron-backing felt. These materials it could have sold in the

market, if it had been permitted, for an amount at least equal to the cost of the materials. It could not have sold the materials without Government permission.

2. Under these circumstances the claimant is entitled to relief according to the rules adopted by the War Department for this class of case. The amount of material and the loss thereon have been determined by the officers of the United States intrusted with the duty of determining these matters. We do not see any reason why that determination should be interfered with. It follows that the claimant is entitled to relief and the amount of relief is that fixed by the zone board at New York, to wit, \$7,037.86.

DISPOSITION.

This board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Howe concurring.

Case No. 1498.

In re **CLAIM OF T. B. STEPHENSON.**

- 1. PROMISE OF RECOMMENDATION IF ARTICLE APPROVED.**—Where the inventor of a bullet-casting machine makes certain improvements to adapt it to the needs of bullet manufacturers, and the Ordnance Department promises to recommend its adoption if it meets the approval of the bullet manufacturers, and where, owing to the armistice, the experimental installation of the machine never takes place, there is no obligation on the part of the Government to reimburse the inventor for his expenses in making the improvements in his machine.
- 2. CLAIM AND DECISION.**—Claim filed under the act of March 2, 1919, for \$1,500, expenses incurred in changing a bullet-casting machine. Held, claimant is not entitled to recover.

Lt. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$1,500 by reason of an agreement alleged to have been entered into between the claimant and the United States to make certain changes in a bullet-casting machine invented and owned by claimant.

2. No hearing has been had in the case, but the documentary evidence is voluminous and, without referring to it in detail, shows clearly that while officials of the Ordnance Department and the Remington Union Metallic Cartridge Co. (Inc.) were interested in this machine and were desirous of having it so changed as to manufacture with great rapidity and with great saving of labor, .30-caliber 1906 slugs for Springfield cartridges, no agreement, express or implied, was ever entered into between the claimant and the United States. It appears as clearly that the claimant in good faith entered upon the work of so changing the machine when the signing of the armistice intervened and had incurred substantial expenditures or obligations in such efforts.

3. In a letter to this Board dated December 30, 1919, Mr. D. W. Lewis, production engineer, Small Arms Division, Ordnance Department, stationed at the Remington Arms Co. plant, who was the principal officer acting for the Government in connection with this matter, says:

“It is the writer’s opinion that Mr. Stephenson has a just claim against the Government for \$1,500, which he expended in good faith, to make over his machine for Government uses. Mr. Stephenson

agrees to give this machine to the Government if this claim of \$1,500 is paid. If settlement is made, the writer believes the Government will acquire a machine which can be used at Frankford Arsenal for the casting of bullets which will do away with a great number of female help and will effect material saving in the making of slugs for the .30-calibers. He further believes that Mr. Stephenson is making a very low claim for the amount of work and money he has expended on [making changes in] this machine."

DECISION.

In view of the foregoing, this Board can do no other than deny relief. A final order denying relief will be entered accordingly.

Col. Delafield and Mr. Patterson concurring.

Case No. 2314.

In re **CLAIM OF COLUMBIA UNIVERSITY.**

- 1. USE OF CLAIMANT'S TELEPHONE.**—Where civilians employed in the Chemical Warfare Service, while engaged in research work for the Government in claimant's laboratories, used claimant's telephone in connection with official business, an implied agreement arose under which the Government is obligated to reimburse claimant for the cost of such telephone calls.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied agreement resulting from the use of claimant's telephone for Government business. Held, claimant is entitled to relief.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$75.22, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. Messrs. C. P. McNeil and W. G. Horsch, of the Chemical Warfare Service, were stationed at Columbia University in New York during 1917 and 1918 for the purpose of doing research work in connection with the Chemical Service of the Government. These gentlemen used a telephone line, which was called "University Drop 127," solely in connection with their Government service. Many of the calls were over the long-distance telephone. These calls were charged by the telephone company to the claimant and paid for by it. Both Mr. McNeil and Dr. Horsch have made affidavits that "the calls were all made in connection with official business and were necessary in the military service." The charges for telephone calls are itemized and their correctness certified by the bursar of Columbia University. The items of charge have been examined and approved by J. G. Anthony, major of the Signal Corps, and S. F. E. Fuhrmann, chief property officer of the Research Division Chemical Warfare Service.

3. The following letter from the office of the Chief Signal Officer, dated December 1, 1919, is quoted:

"There is enclosed a voucher covering services rendered Research Division of the Chemical Warfare Service at Columbia University, from October 1, 1917, to June 24, 1918, in amount \$75.22.

"2. No contract was entered into for this service due to the emergency then existing. The services were, however, rendered in good faith and recommendation is made that Columbia University be reimbursed.

"3. In the event of settlement the appropriation 'Signal Service of the Army, 1918,' should be charged.

"By authority of the Chief Signal Officer:

"(Signed)

F. R. CURTIS,
"Colonel, Signal Corps."

DECISION.

1. There is no evidence of any express agreement between Columbia University and the United States in respect to charges for telephone calls, but it does not appear that the United States Government expected Columbia University to pay for such use of the telephone as Government agents stationed at the university found necessary in the course of the performance of their governmental duties. If the chemists by favor of the university had free use of its laboratories for governmental purposes it does not follow that the university intended to make a gift to the United States of its telephone facilities. The contrary inference is the only justifiable one under all the circumstances.

2. The telephone calls were all for governmental purposes and the Government should pay for them.

3. An implied agreement therefore arose by which it became the duty of the United States to reimburse Columbia University for such payments as it has made for necessary telephone calls by Government employees stationed at the university. The items making up the charges of \$75.22 have all been examined and approved by Government officers. There seems to be no reason why Columbia University should not be repaid the sum of \$75.22.

Note Col. Curtis's statement: "3. In the event of settlement the appropriation 'Signal Service of the Army, 1918' should be charged."

DISPOSITION.

This Board will make a statutory award in accordance with this decision and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Howe concurring.

Case No. 2139.

In re CLAIM OF SIGMUND EISNER CO.

1. **FACILITIES.**—Where claimant had a contract to examine, measure, and shrink an indefinite quantity of cloth for the Government, and where claimant was, in connection therewith, instructed to increase its facilities and to develop a greater capacity for the handling of all Government-owned material to be used in the manufacture of Army clothing under existing contracts, there arose an implied obligation on the part of the United States Government, under the act of March 2, 1919, to save claimant harmless on this loss sustained, by reason of the installation of such facilities.
2. **CLAIM AND DECISION.**—This is an appeal from the decision of the Office of Director of Purchase upon a claim for \$6,863.29, wherein claimant seeks reimbursement for facilities procured in connection with certain Government work. Held, that claimant should be saved harmless from loss sustained.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Office of the Director of Purchase upon a claim for \$6,863.29, reimbursement of expenditures made and obligations incurred upon the faith of Quartermaster Corps contract No. 3794, dated June 20, 1918, between Sigmund Eisner Co., of Red Bank, N. J., and the Government, acting through Col. Alexander R. Piper, Quartermaster Corps, United States Army, under which the claimant agreed to examine, measure, and shrink woolen and cotton materials.

2. At the time this contract was entered into the claimant was engaged in the manufacture of Army overcoats, uniforms, mackinaws, shirts, and other articles of apparel, for the performance of which the Government agreed to furnish 30,000 to 40,000 yards of woolen and cotton materials a day shrunk and ready for use.

3. Shortly before the present contract was entered into, Lieut. H. W. Chase, Quartermaster Corps, in charge of the shrinking and finishing section of the office of the zone supply officer at New York, inquired of Mr. H. Raymond Eisner, vice president of the claimant, as to its capacity for shrinking and finishing Government-owned materials and was informed that during the summer months the

favorable weather conditions for drying increased the capacity of its then existing facilities to a maximum of 15,000 to 18,000 yards per day.

4. Shortly thereafter, Lieut. Chase was directed to make an inspection of the claimant's shrinking and finishing facilities, and he confirmed the information given by Mr. Eisner and recommended that the present contract be entered into with the claimant.

5. The capacity of the shrinking plants in the New York zone was inadequate to supply the requirements of manufacturers to whom the Government had agreed to furnish cloth for the production of Army clothing, and this condition was aggravated in June, 1918, when Lieut. Chase found it to be in the interest of the Government to cancel seven or eight shrinking and finishing contracts because of unsatisfactory workmanship. Shortly thereafter and about the time when contract No. 3794 was entered into, Lieut. Chase consulted Mr. Eisner and asked if it would be possible for the claimant to increase its shrinkage and finishing facilities to enable it to take care of all Government-owned materials to be furnished for its use in the manufacture of garments under existing contracts. Mr. Eisner replied in the affirmative, and Lieut. Chase stated to Mr. Eisner that it would be "great" if he would procure the facilities for so doing, and suggested several types of equipment and sources of supply. Upon the faith of contract No. 3794 and Lieut. Chase's instructions the claimant ordered equipment to be delivered and installed in August, 1918, costing approximately \$15,006.59.

6. Mr. Eisner testified that the labor cost of shrinking and finishing materials after the installation of the increased facilities would amount to not more than 3 per cent, and as the Government was obligated to pay the claimant from 1 to 2 cents per yard for the handling of this material a very substantial percentage could be used to amortize the cost of the increased facilities. The claimant expected to be able to completely amortize the cost of the increased facilities under the present contract.

7. Although the orders for the equipment with which to increase its facilities contemplated delivery in time to enable the plant to start operation in August, some of the essential equipment was not delivered until shortly before the armistice was signed and the plant was never operated. Production under all garment contracts was suspended shortly after November 11, 1918, and upon receipt of this notice, which in fact likewise suspended work under contract No. 3794, the claimant canceled all orders for equipment which had not yet been delivered and effected the disposal of the equipment already installed as above and for which it had no use in its normal business.

DECISION.

1. The written contract with the Government was silent as to the quantity of material to be handled by the claimant, and, therefore, it is competent to consider other evidence as to the intention of the parties in this respect. The testimony of the claimant that Lieut. Chase instructed and urged it to increase its facilities and to develop a greater capacity for the handling of all Government-owned material to be used in the manufacture of army clothing under existing contracts is confirmed by Lieut. Chase, and it is the opinion of this Board that the claimant was justified in increasing its facilities.

2. The claimant should be saved harmless against loss on account of its proper action in the premises. It is entitled to payment in a sum equal to the exact amount paid to release itself of obligations incurred upon the faith of the present contract, and also to the difference between the cost of such equipment as was delivered to it and the market value of such equipment at the time when it was sold or otherwise disposed of or appropriated by the claimant.

DISPOSITION.

1. This Board will cause the amount due to the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division, and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Smith concurring.

Case No. 2008.

In re CLAIM OF URFIT PANTS CO.

1. **EXPENDITURES ON FAITH OF CONTRACT.**—Where a claimant is unable to show that any work was done under an alleged contract or that any expenditures or commitments were made on the faith of the contract, claimant is not entitled to relief under the act of March 2, 1919.
2. **RECOMMENDATION.**—A recommendation of an award is not a contract.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a written notice that a contract had been awarded claimant for the manufacture of woolen breeches. Held, claimant is not entitled to relief. There was no contract and no expenditures made on the faith of the alleged agreement.

Mr. Harding writing the opinion of the Board.

This is an appeal on a class A claim from the Claims Board, Office of Director of Purchase. A statement of claim, Form A, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$1,135.95, by reason of an agreement alleged to have been entered into between the claimant and the United States. The claim is made up of the following items:

1 baler, cost \$282, value to-day about \$150, loss.....	\$132.00
1 bale burlap, cost \$512.81, disposed at \$422, loss.....	90.81
Thread, cost \$207.14, worth to-day about \$150, loss.....	57.14
Tape, cost \$462, worth to-day \$231, loss.....	231.00
Factory and business idle 4 weeks at \$150, loss.....	600.00
Trip to Jeffersonville.....	25.00
	<hr/>
	\$1,135.95

FINDINGS OF FACT.

1. Prior to the alleged contract upon which claimant is making this claim, it is claimed it had been awarded three contracts by the United States Government:

Contract No. 904, for 55,000 pairs O. D. breeches.

Contract No. 1213-C for 32,000 pairs O. D. breeches, dated March 11, 1918.

Contract No. 4124-J, for 18,000 pairs O. D. breeches, dated June 12, 1918.

At the time the claimant entered into the alleged contract upon which it is now making this claim, it was engaged upon the performance of the last-mentioned contract and the cotton pants therein provided for were then in process of manufacture. The materials which entered into these pants, except the sewing and labels, were furnished by the Government.

The claimant alleges that on or about November 4, 1918, it was notified by Capt. Houston, an officer of the Quartermaster's Department at Jeffersonville, Ind., acting under the authority, direction, or instruction of the Secretary of War, that it had been awarded a contract for the making of 60,000 wool pants at 75 cents per pair, or 80 cents if baled, and was further instructed that the order was to be executed speedily. Claimant alleges that such contract was entered into by the authority of Harry L. Wells, chief of uniform section, clothing branch, Clothing and Equipage Division, Office of Director of Purchase. The testimony of Harry L. Wells is to the effect that while an award of the contract in question had been recommended for claimant, and it had been notified that the contract had been or would be awarded, that no contract had in fact been awarded or approved and that no contract was actually entered into with claimant other than what it might have assumed from the notice of Capt. Houston that one had been awarded to it. Claimant was notified that the contract would not be proceeded with on or about the 14th day of November, 1918. The original invoices attached to the files show that the goods upon which the claimant is alleging its loss were purchased beginning March 20, 1918, and ending September 25, 1918, inclusive.

DECISION.

It is evident from the evidence of the claimant itself that it lost nothing and is entitled to no recovery on account of the alleged contract in question. The claimant states as to the materials:

"That said raw material therein referred to was purchased partly for the purpose of completing the contract then on hand and partly for the purpose of doing any work under the new contract it might be awarded by the Government; that said purchases made, in anticipation of new contracts, were made for the purpose of assuring the Government that if any contracts were awarded the Urfit Pants Co. said Urfit Pants Co. would be able to carry the same out promptly and with great dispatch. These purchases, in anticipation of future contracts, assured the Government not only of the carrying out of the contract promptly, but removed any possibility of unavoidable delays, by either the difficulty of obtaining necessary material, or delays in transportation."

* * * * *

"The baler mentioned therein, while purchased for use on Government contract No. 4124-J, came in too late to be used on said contract, so it was held, to be used upon the new contract, which was assured the Urfit Pants Co."

The original invoice shows that the baler was ordered August 8, 1918, and that it was shipped August 29, 1918, from Ann Arbor, Mich., to Newport, Ky.

2. As to the item which the claimant is claiming on account of idleness of its factory, it seems from claimant's testimony that the lost time claimed was not continuous, but made up of odd days and hours during which its factory was idle, spread over the whole time it was doing Government work, and had no connection with the contract in question. Such four weeks of idleness could not of course have elapsed from the date of this alleged contract, November 4, 1918, down to the date when he was informed that the contract would not be proceeded with.

It is not possible that the damage claimed by the claimant on account of loss arising out of this contract can have any merit whatever. The alleged contract, which never ripened into an actual contract, was of November 4, 1918, and the notice to proceed no further with it was only 11 days later. The trip to Jeffersonville, Ind., was made November 7, 1918, but claimant made no answer to the questionnaire asking its purpose. It must be considered here as an ordinary business expense.

No work was done upon the alleged contract and no expenditures or commitments were made on the faith of it.

The decision of the Claims Board, Office of Director of Purchase, is affirmed, and the claim should be disallowed.

Col. Delafield and Mr. Hamilton concurring.

Case No. 1968.

***In re* CLAIM OF SPER MEL CLOTHING CORPORATION.**

- 1. RECOMMENDATION OF AWARD.**—Recommendation of an award is not an agreement within the meaning of the act of March 2, 1919, and where no contract was made or orders given there can be no liability on the United States.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for damages under alleged oral agreement for the manufacture of uniform coats. Held, no agreement.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 by the Sper Mel Clothing Corporation, 47 Broome Street, New York, for \$15,344, damages sustained by reason of an agreement alleged to have been entered into on or about November 4, 1918, between the claimant and the Government, acting through Mr. Harry L. Wells, acting chief, uniform section, manufacturing branch, Clothing and Equipage Division, Quartermaster Corps, United States Army, New York office, for the manufacture of 40,000 uniform coats from Government-owned materials.

2. On or about September 24, 1918, the claimant submitted a proposal for the manufacture of wool-lined service coats in accordance with specifications No. 1356 at the rate of 8,000 per week. On October 29, Mr. Wells forwarded a recommendation to the Office of the Quartermaster General at Washington that a contract be issued to the claimant for the manufacture of 40,000 coats, deliveries to cover a period of 10 weeks.

3. Having entirely completed the performance of earlier contracts and being without work and, it is alleged, having received an offer for its plant which the claimant desired to accept in the event it was not to perform further Government contracts, the claimant asked Mr. Wells whether additional contracts would be awarded to it. The claimant testified that Mr. Wells stated to him that he had no reason to worry and supported his assurances by exhibiting a book containing an entry "Sper Mel Clothing Co., 40,000 coats."

4. Mr. Wells denied having shown the claimant any writing such as that described by the claimant. He testified that he remembered having been approached by a representative of the claimant company and having been interrogated as alleged, but denied having told the claimant or in any way led the claimant to believe that a contract had been awarded to it as, at the time of the claimant's call, the fact was otherwise.

5. Mr. Wells admits as a likely possibility that he told the claimant that it had been *recommended* for an award, as it was his custom to give such information to prospective contractors. He insists, however, that such a statement if made, was qualified by a warning that the recommendation was not a final action and had been submitted to the office of the Quartermaster General at Washington for approval. At the time of the conversation referred to the recommendation had not been acted upon.

DECISION.

1. It has been repeatedly and correctly held that a courtesy extended to a prospective contractor by a Government officer in keeping it advised of the status of its business with the Government can not later be construed as an act binding the Government in any way.

2. In its consideration of the recommendations made by the New York branch, the Office of the Quartermaster General at Washington, which reserved to itself the right of final action, had not yet arrived at a decision. Information that its proposal had been regarded favorably by subordinate offices might justify the assumption of a business risk by the claimant, but no construction of an act merely communicating such information to the claimant can be regarded as binding the Government.

Col. Delafield and Mr. Harding concurring.

Case No. 1840.

In re **CLAIM OF LAMBERTVILLE RUBBER CO.**

- 1. SUSPENSION OF FORMAL CONTRACT.**—When a formal contract is suspended the contractor is entitled to settlement under Supply Circular No. 111 in respect to the uncompleted portion of the contract.
- 2. CLAIM AND DECISION.**—Claim presented under General Order 103 based upon a formally executed contract for hip rubber boots. Held, claimant is entitled to relief.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$508.73, under the following circumstances:

2. On or about the 19th day of October, 1918, the claimant entered into a formal duly executed and written contract with the United States providing for the manufacture and delivery by the claimant of approximately 10,004 pairs of hip rubber boots at a unit price of \$5.25 per pair, the contract number being 7152-N. The claimant has manufactured and delivered and been paid for the hip boots called for by this contract with the exception of 116 pairs. The armistice intervened before this small number was manufactured and shipped. No supplemental or settlement or cancellation agreement has been executed in respect to contract No. 7152-N. This contract was suspended at the request of the United States shortly after the armistice.

DECISION.

The claimant is entitled to receive whatever may be due it in respect to the small number of pairs of rubber boots which the United States has not taken.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action under Supply Circular No. 111.

Col. Delafield and Mr. Howe concurring.

Case No. 328.

In re CLAIM OF MILWAUKEE PATENT LEATHER CO.

1. **SUBCONTRACTOR—NO AGREEMENT WITH GOVERNMENT.**—A subcontractor whose contract is breached because of the signing of the armistice, has no agreement with the Government, and therefore can not present a claim against the Government under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for the value of leather khaki splits left on claimant's hands at the time of the signing of the armistice. Claimant was a subcontractor. Held, claimant is not entitled to relief.

Mr. Bayne writing the opinion of the Board.

This is a claim, class B, for \$3,559.08, which claimant alleges to be the value of 88,977 square feet of leather khaki splits for Government Army purposes, alleged by claimant to have had on hand at the armistice.

The claim was set for a hearing, along with others, on October 24, 1919. Claimant appeared at the hearing, by its representative.

This Board finds the following to be the facts in this case:

FINDINGS OF FACT.

1. Some time prior to the armistice, claimant made a contract for 1,000 dozen khaki splits with C. W. Stafford & Co., Chicago, Ill., which company appears to have had a contract with the Helmholtz Mitten Co., which in turn had a Government contract, No. 2563-C, for gloves.

2. After the armistice and in consequence thereof, C. W. Stafford & Co. canceled its contract with claimant, leaving claimant with 838 dozen, or 55,727 square feet of said khaki splits, valued at \$2,229.08.

3. Claimant also made a contract some time prior to the armistice for 500 dozen khaki splits, with Edgar S. Kiefer Tanning Co., of Chicago, Ill., which company appears to have had a contract with the Tecumseh Facing Mills, which in turn had a Government contract, No. 2697-C, for gloves.

4. Said Edgar S. Kiefer Tanning Co., after the armistice and in consequence thereof, canceled its contract with claimant and left claimant with 500 dozen, or 33,250 square feet, of these splits on hand, valued at \$1,330.

5. Claimant thus had after the armistice 88,977 square feet of khaki splits, valued at \$3,559.08, the amount of claimant's claim.

6. It does not appear that C. W. Stafford & Co. had a right to reject the 838 dozen splits which claimant had lawfully sold to said Stafford & Co. in pursuance of its contract with them, nor does it appear that claimant was obligated to accept said khaki splits so rejected, or that claimant did not have a good claim against Stafford & Co. for the full value of said splits.

7. It does not appear that Edgar S. Kiefer Tanning Co. had a right to reject the 500 dozen khaki splits which claimant had lawfully sold to said Kiefer Tanning Co. in pursuance of its contract with that company, nor does it appear that claimant was obligated to accept said 500 dozen khaki splits, so rejected, or that claimant did not have a good claim against the Kiefer Tanning Co. for the full value of said splits.

8. So far as appears, claimant had lawfully fulfilled or was in position to fulfil its contracts with C. W. Stafford & Co. and with the Edgar S. Kiefer Tanning Co., and neither of said contractors had the right to impose upon claimant any losses which they might have sustained because the armistice was signed.

9. There is no evidence that the Government agreed to purchase of claimant these 88,977 square feet of khaki splits, nor is there any evidence that claimant tendered the same to the Government, or that claimant is holding the same subject to the order of the Government.

DECISION.

1. Claimant has shown no agreement with the Government whereby the Government has undertaken to pay the damages which claimant sustained by reason of the breach on the part of C. W. Stafford & Co. of its contract with claimant, nor has claimant shown any agreement with the Government whereby the Government has undertaken to pay the damages sustained by claimant on account of the breach on the part of Edgar S. Kiefer Tanning Co. of its contract with claimant.

2. The claimant's claim should be dismissed.

DISPOSITION.

An order should be entered dismissing the claim of claimant and denying the relief prayed for in its statement of claim.

Col. Delafield, Mr. Hunt, and Mr. Bryant concurring.

Case No. 695.

In re CLAIM OF F. W. McLANATHAN & SON.

1. **CIRCUMSTANCES IMPLYING AN AGREEMENT.**—Where claimant was informed by authorized officers that it had been recommended for a contract for a definite number of garments, delivery to commence on a definite date, and claimant received materials supplied by the Government for the purpose of the contract which as a matter of fact had, unknown to claimant, been approved by the Board of Awards, there is an implied agreement within the purview of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied agreement for the manufacture of woolen trousers. Held, claimant is entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim in a petition in the nature of Form B has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$6,170 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On October 4, 1918, Mr. Frank W. McLanathan, who is the sole owner and manager of the claimant, F. W. McLanathan & Son, had a conversation with Mr. Bernard F. Tully, an assistant in the uniform section, Clothing and Equipage Division, Quartermaster General's office, New York, which conversation, it is now contended, forms the basis for the present claim for \$6,170 for reimbursement of expenditures made in anticipation of a Government contract for 20,000 pairs of woolen trousers.

The purpose of Mr. McLanathan's visit to Mr. Tully on October 4 was to straighten out a misunderstanding with the Boston office about a contract which the claimant was then seeking to obtain. The differences over this first contract were adjusted satisfactorily by Mr. Tully, and claimant was given a contract, No. 6965-B, to manufacture 15,000 pairs of trousers, for which the Government was to furnish the material. When claimant was ordered to suspend operations on this contract on November 15, 1918, claimant had manufactured about one-third of the 15,000 trousers called for. Full settlement has been made with the Government on account of this contract, under which claimant was paid the price agreed for the completed trousers and 21 cents apiece for the 10,505 which were not

completed, and for which the Government had furnished the cloth, and so its only importance on the claim now presented is to explain the whole interview between claimant and Mr. Tully which occurred on October 4, 1918, and to show what items of claim herein made, if any, have not already been allocated to the first contract.

3. Mr. McLanathan's version of the conversation with Mr. Tully on October 4 was substantially as follows:

"I told Mr. Tully I could not take a Government contract unless I got definite assurances of further contracts, as it would not pay me to take one contract and build up an organization unless I could have a minimum of two contracts. Mr. Tully answered he was glad to get good contractors, and would place a contract with me at once, and give definite assurances of a further contract or contracts, and it would be a good plan to train help and build up equipment for larger production on a second contract. Mr. Tully said, 'I will give you a small contract first, larger later.' There was no agreement as to price, quantity, or whether the future contract should be for coats or trousers."

Mr. McLanathan testified that he took the first contract, feeling absolutely sure of a second one.

4. Mr. Alfred C. Gaunt, who was present at the conference between Mr. McLanathan and Mr. Tully, testified as to it substantially as follows:

"Mr. Tully stated the Government was in need of trousers, and was looking for good contractors; that he would award a first contract for 15,000 pairs of trousers, and would want Mr. McLanathan to prepare for further contracts for either coats or trousers, as a second contract would follow. Mr. Tully also said that contractors would be rated for future awards on their past performance on contracts, and that the manner in which the claimant performed the first contract would govern the allotment on further contracts."

5. Mr. Tully testified in effect as follows:

His duties did not permit him to award contracts, but that his functions were merely to consider applications for contracts and make recommendations. His office had a definite policy which was followed closely so as not to mislead contractors, viz, all applicants for contracts were told that if they performed satisfactorily their present contracts, and if the Government need continued, it was the policy of the office to keep producing operators on our books for future awards, but his office never awarded a contract unless the local depot recommended it. He never gave Mr. McLanathan any assurance or promise of a further contract, as it was directly against their policy. He did not advise claimant to make immediate preparations to handle a second contract. He generally told contractors that if they wanted to secure a larger contract, the best way to obtain it was to secure a high rating on production on present contracts. The witness admitted that this would necessarily entail increasing the contractor's organization. Mr. Tully testified that he did not tell Mr. McLanathan that if he trained help and built up an equipment, he would be given another contract. He always told contractors that his recom-

mendation did not become a contract until a formal contract was signed by the applicant and the local depot authority.

6. On November 2, 1918, the claimant was informed by a letter from Lieut. Lawrence S. Mann, Quartermaster Corps, assistant depot quartermaster, Boston, as follows:

"1. This depot has just received advice from the office of the Quartermaster General, New York City, that you have been recommended for an award on woolen trousers, delivery to commence January 4th.

"2. According to records of this branch, it is to be noted that you are greatly delinquent on your present contract, and unless you make every effort to overcome this delinquency it will be impossible for you to make your first delivery by that date. * * * It will be absolutely necessary that you start first deliveries against your new contract on January 4th. Material will be issued to you not later than December 1st.

"3. In the next issuance of awards contractors who have delivered exactly in accordance with the terms of their contract will only be considered."

After receipt of the letter of November 2, Mr. McLanathan was told by some one speaking on the telephone from the office of the depot quartermaster, Boston, that the contract called for 20,000 pairs of woolen trousers. Twenty-one thousand seven hundred yards of Melton cloth for this contract were received by the claimant from the Boston quartermaster's depot in excess of the Melton cloth received for the first contract. This cloth was stored by claimant, and none of it was cut for the second contract, nor was any actual manufacturing work done by the claimant except for the first contract.

On November 15, 1918, the claimant received notice from the depot quartermaster, Boston, to suspend operations immediately on all contracts on which no work had yet been done, and hold up until further information.

Claim is made for machinery installed, labor done, and wages paid for training employees to perform the Government work. The claimant admitted that on November 2 he used the new facilities as fast as he could in the performance of the first contract. He also admitted that on November 2 he did not have an organization or facilities more than sufficient for the performance of his first contract. (Record, pp. 43, 44.) He stated that after November 2 he purchased additional facilities which were necessary to perform the second contract, but were not necessary for the first. (Record, p. 45.) Items are included in the present claim for wages paid employees who were actually working on the first contract, but who were thereby getting a training to be efficient to perform future contracts. (Record, pp. 52, 53.)

7. It further appears that the procurement officer, Mr. Harry L. Wells, recommended the claimant for a contract for 20,000 pairs of

woolen trousers at 75 cents per pair, the Government to furnish all materials except sewing and labels. On October 31, 1918, the Board of Awards approved this recommendation and forwarded it to the contracting officer under date of November 5 to prepare a contract. This contract was duly prepared but never issued or sent to the claimant, owing to the instructions received on November 7 from the Chief of the Clothing and Equipage Division to suspend all operations and forward no further contracts.

DECISION.

1. The claimant contends that its facilities and organization were increased on account of the statements made to Mr. McLanathan on October 4, 1918, by Mr. Tully, of the Quartermaster General's office, New York. The purpose of this conversation was to straighten out some difficulties which had arisen between claimant and the Quartermaster's office at Boston in regard to an award of a contract which claimant was seeking for the manufacture of 15,000 pairs of trousers. The matter was arranged satisfactorily and claimant was given contract No. 6965-B for 15,000 pairs of trousers, which contract was suspended on November 15. The Government has settled in full with claimant for the 4,495 pairs of trousers it manufactured under contract No. 6965-B, and has paid claimant 21 cents apiece for 10,505 pairs of trousers, which were the balance of the order which were not manufactured, which payment must be taken to include, in part, an amortization of the machinery and equipment necessary to perform this contract.

2. Having in mind the fact that the purpose of the conference of October 4 between Mr. McLanathan and Mr. Tully was to arrange for the award of contract No. 6965-B, we have Mr. McLanathan's statement that he was unwilling to accept one contract without the assurance of another contract, and that Mr. Tully did give him such an assurance, with the result that claimant made the expenses in acquiring equipment and building up an organization, for which he now seeks reimbursement. In this statement Mr. McLanathan was corroborated by Mr. Gaunt, but the latter, however, qualified his testimony by stating that Mr. Tully said that contractors would be rated for future awards on their performance on existing contracts, and that such rating would govern the allotment of future contracts. From claimant's own witnesses, therefore, it is clear that no definite promise of a future contract was given Mr. McLanathan by Mr. Tully, because the award of a future contract was contingent on whether the claimant should make good on contract No. 6965-B, which was then given.

Mr. Tully testified that he never gave Mr. McLanathan any promise or assurance of a future contract. He did not tell him that if he built up an equipment he would be given another contract. He did not advise Mr. McLanathan to make immediate preparations to handle a second contract. Mr. Tully further testified that he said it was the policy of his office to keep producing operators on the books for future awards, but that his office never awarded a contract unless the local depot recommended it, and such recommendation was always based on the past performance of the contractor. In this latter statement Mr. Tully was substantially corroborated by Mr. Gaunt.

It is clear that no promise of a second contract was made by Mr. Tully during the conversation with claimant on October 4, but that the probability of the claimant obtaining a future award was wholly contingent on its making good on contract No. 6965-B, and of its receiving the favorable recommendation for a future award from the Boston depot quartermaster. The Board, therefore, finds that no agreement, within the meaning of the act of March 2, 1919, resulted from the conference held on October 4, 1918, between Mr. Tully and Mr. McLanathan.

3. On November 2 the depot quartermaster, Boston, wrote claimant that it had been recommended for an award on woolen trousers, delivery to commence January 4. On November 15 notice to suspend contract No. 6965-B was received by claimant. Prior to the latter date claimant received from the Government Melton cloth, which it alleges was in excess of the requirements of its previous contract No. 6965-B. This cloth was stored by claimant, and was not cut. It was eventually returned to the Government, as no actual work of manufacturing was done on the alleged second contract.

4. The question to be decided is the legal effect within the meaning of the act of March 2, 1919, of the notice of the recommendation for an award dated November 2, 1918, followed by receipt from the Government of the cloth necessary to manufacture 20,000 pairs of trousers, plus the fact that the Board of Awards, on October 31, actually approved the recommendation for an award of a contract for 20,000 pairs of trousers, but no notice of this approval was communicated to claimant, although it was told by the office of the depot quartermaster, Boston, that the contract would be for 20,000 pairs of trousers.

5. We are of the opinion that an implied agreement within the meaning of the act of March 2, 1919, arose out of the circumstances set forth, and that the claimant is entitled to a reasonable remuneration for expenditures, obligations, and liabilities necessarily incurred in performing or preparing to perform said agreement.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Office of the Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield, Mr. Patterson, and Mr. Bryant concurring.

Case No. 2017.

In re CLAIM OF PRESSED STEEL CAR CO.

1. **ADJUSTMENT OF CLAIM—PROSPECTIVE PROFITS.**—Where an informally executed contract was suspended at the signing of the armistice the adjustment of any claim thereunder against the United States is governed by the act of March 2, 1919, which expressly excludes reimbursement for prospective profits. Claimant is therefore not entitled to be paid the difference between the contract price and the cost to the claimant of completing the contract, as such a basis of settlement would include prospective profits.
2. **INTEREST.**—Interest on the amount of a claim against the Government can not be allowed in the absence of special agreement or express statute.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a purchase order for Artillery trucks. Claimant is entitled to relief but has refused to attend the hearing or to comply with requests for information needed to determine the amount of an award. Referred to Engineer Claims Board for further action.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim comes on appeal from the Engineer Claims Board. Statement of claim for \$425,635.39, partly on Form A, prescribed by Supply Circular No. 17, Purchase, Storage and Traffic Division, 1919, has been filed by claimant, on an alleged written agreement with the United States.

2. The claim was set for a hearing. The claimant, when notified, stated that it saw no advantage to be gained by a hearing, and that it was content to have the decision of this Board on the record 'as it stood, without further hearing or argument.

3. The claimant make no allegation "that the said claim has not been executed in the manner prescribed by law," but, on the contrary, exhibits Purchase Order No. 26621, dated September 27, 1918, signed by Lieut. Col. Earl Wheeler, Engineer Corps, for 800 Artillery trucks, on certain specifications, at a total contract price of \$540,000, and asserts that this is a valid and subsisting contract between the United States Government and the claimant, that it was executed "as directed by the Military Department and in the same way as other orders awarded to and executed and fulfilled by claimant and paid for by the Government, but that the comptroller has ruled since

the armistice that such agreements have not been executed in the manner prescribed by law."

4. The claim is for the contract price of \$540,000, less an itemized credit amounting to \$114,364.61. This is alleged to be the amount which it would have cost the claimant to complete its contract.

5. The claimant also claims interest at the rate of 6 per cent per annum from November 12, 1918, on the said sum of \$425,635.39.

6. The purchase order above mentioned was issued and commitments were made and manufacturing begun thereunder, but there were no trucks completed, and now the Government does not want any of them. On November 12, 1918, the order was suspended. Nothing in the record indicates what would be a proper allowance under the act of March 2, 1919.

7. An examination has been made of the materials on hand. In order to determine the amount to which the claimant is entitled it is necessary to have a fully itemized statement of the amounts it paid for these materials and the basis on which its administrative overhead is determined. This the claimant has declined to furnish.

8. Under date of April 22, 1919, the following letter was addressed to the claimant:

APRIL 22, 1919.

From: Director General Military Railways.

To: Pressed Steel Car Company.

Subject: Termination of Order #26621.

1. Referring to your statement of claim against the Government for termination for above order, this is not in accordance with the law approved March 2d, by which all these ought to be settled. This law does not allow prospective profits, as would be included in your claim of \$425,635.39, as in arriving at this figure you apparently subtract the additional expense that would be necessary to complete the order from the total of the order and charge us with the difference.

2. According to the above-mentioned law the contractor is allowed:

- (a) Expenses for finished material and direct labor.
- (b) Labor overhead.
- (c) Administrative overhead on direct labor and material.
- (d) A remuneration, up to 10 per cent of the above three items, allowed at the discretion of the negotiating officer.
- (e) Raw materials.
- (f) Settlement charges to subcontractors.
- (g) Administrative overhead on above two items.
- (h) Interest on capital tied up in raw material from date of payment for such material until the date of settlement of claim; this is allowed at 6 per cent unless the money was borrowed, in which case at the rate of interest paid.

3. As the Government does not wish to retain possession of the material involved in settling claims, it is desired that on all statements of material at prime and subcontractors, a fair market value be allowed, this salvage to be subtracted from the total of the items

in above paragraph, and the material to remain the property of the contractor.

4. The settlement suggested in paragraph 7 (b) of your statement of claim is nearly correct, but is not in proper form, and you do not furnish supporting papers. We must have certified copies of all invoices for material and certified copies of labor charge sheets. In paragraph 7 you state that your obligations to subcontractors amount to \$107,011.42, and that your total expenses at your own factory were \$102,050.81. Please furnish statements showing method of arriving at these figures, with the necessary invoices or labor charged to cover each item.

5. We enclose information sheets to aid you in furnishing the supporting papers. If you have any difficulty in following these directions, we would suggest that you have an agent to call at the office of Director General Military Railways to work it out with the negotiating officer.

J. M. WRIGHT,
Colonel of Engineers.
By C. R. McKINSEY,
Captain of Engineers.

9. From time to time similar requests have been made of the claimant by Government officials, all of which have been refused. When Capt. Ranck was sent to claimant's plant to inspect the material on hand for this order and determine what would be the proper allowance to claimant under the rules of the War Department, he was shown an itemized list of the quantities of material, together with the prices, but before he was furnished a copy, that portion of the statement containing the prices was cut off.

DECISION.

1. The purchase order constituted an informal contract which, although binding upon the claimant, is, by express statute, not binding upon the Government. (U. S. Rev. Stat., sec. 3744, *United States v. New York & Porto Rico Steamship Co.*, 239 U. S., 88; *Clark v. United States*, 95 U. S. 539.)

2. Congress, having in mind numerous informal contracts of this character, in order to remedy the hardship and injustice involved in such cases by the statute above quoted, passed the act of March 2, 1919, authorizing the Secretary of War to adjust, pay, or discharge such agreements upon a fair and equitable basis, but it expressly limited the authority of the Secretary of War and of the Court of Claims by a proviso *forbidding* them "to include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States, and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform the said contract or order."

3. The claim as presented is based upon the usual rule as to damages for breach of contract by individuals, namely, the contract price less the cost to the contractor of completing the contract. Presumably it would be a valid claim against the Government on this basis but for the statute above cited and the decisions of the Supreme Court of the United States thereunder.

4. In view of the statute, the claim as presented can not be allowed, nor can the claimant be allowed anything except in the manner and to the extent prescribed by the act of March 2, 1919.

5. In order to effectuate the provisions of this act, the Secretary of War, by means of certain supply circulars, has established the procedure and the basis for determination of amounts due claimants under informal contracts. (Compilation of Supply Circulars and Supply Bulletins of the Purchase, Storage and Traffic Division, General Staff, War Department, issued between Apr. 24, 1918, and May 1, 1919, Art. XIX.)

6. That the Secretary of War may give the relief authorized by the act of March 2, 1919, it will be necessary for the claimant to furnish such information as is requested in the letter above quoted in paragraph 8 of the "Findings of fact," and any other information which may be found necessary under the practice prescribed in the Compilation of Supply Circulars and Supply Bulletins.

7. There appears to have been a misunderstanding on the part of the claimant as to the limitations upon the authority of the Secretary of War under the statutes and the decisions of the Supreme Court of the United States; and the claim will be sent back to enable the claimant to furnish the Claims Board with such information as is necessary for the determination of the amount due.

8. Claimant is not entitled to the interest claimed. In the absence of agreement or express statute, interest is not allowed against the Government. (*United States ex rel. de la Rue v. Bayard*, 127 U. S., 251.)

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Engineer Claims Board for appropriate action.

Col. Delafield and Mr. Henry concurring.

Case No. 1796.

In re. CLAIM OF E. LEITZ (INC.).

1. **AGREEMENT CONSUMMATED TOO LATE.**—Where claimant alleged that on November 10, 1918, its representative in Washington was informed that a contract had been awarded to claimant, but is unable to furnish the name of the officer or agent of the Government who gave its representative this information, and on November 14, 1918, written notice of a contract was mailed, there was no agreement made prior to November 12, 1918, as required by the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a contract awarded November 14, 1918. Held, claimant is not entitled to relief.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case comes to the Board of Contract Adjustment on appeal from the Claims Board, Director of Purchase. Statement of claim, Form A, was filed with the Claims Board, Director of Purchase, June 2, 1919. An appeal was noticed to the Board of Contract Adjustment by letter of August 7, 1919. The claim is for \$279.50, by reason of an agreement alleged to have been entered into between the claimant and the United States on or about the 10th day of November, 1918.
2. In response to a circular dated October 9, 1918, issued by the Medical Department, United States Army, calling for bids on 500,000 petri glass dishes, claimant submitted a bid for 14,000 dishes. This circular stated that the bids would be opened on November 9, 1918.
3. Claimant submitted a bid, not complying with the circular which required a bid on 500,000 dishes; but limited its bid to 14,000 dishes, which claimant stated in its bid were in stock and were all that he could bid for.
4. On November 9, 1918, bids were opened and claimant, in its petition, asserts that on November 10, 1918, claimant's representative in Washington was informed that an award of 14,000 dishes had been made to claimant. Claimant, however, though requested to do so, has failed to furnish the name of the officer or agent of the

Government who informed its representative that an award had been made. No hearing has been had in the matter because of the statement of the claimant in its letter of December 4, 1919, after this Board had requested, under date of November 11, 1919, certain essential information which was required by the Government to establish claimant's case, as follows: "We can not possibly add anything further to our statement."

5. On November 14, 1918, written notice of award for 14,000 petri dishes was mailed claimant.

6. On December 31, 1918, claimant by letter of its president wrote Lieut. Col. Reasoner, chief of the field medical supply depot, waiving all claim with respect to the 14,000 petri dishes which was the subject of this order, and again on March 17, 1919, the claimant, through Mr. A. Fraeger, its general manager, wrote the Director of Purchase and Storage saying: "We agreed with our letter of December 31, 1918, to cancellation of this contract without compensation."

DECISION.

On the facts before the Board, there is nothing to indicate that a contract, formal or informal, exists between the claimant and the United States, consummated prior to November 12, 1918. It further appears from the claimant's letter of December 31, 1918, and its letter of March 17, 1919, that all the rights of the claimant under any such alleged contract have been waived. Relief is therefore denied.

DISPOSITION.

A final order of this Board denying relief will be entered accordingly.

Col. Delafield and Mr. Patterson concurring.

Case No. 32.

In re CLAIM OF MACY ENGINEERING CO.

1. **EXPERIMENTAL EXPENSE.**—Where the price of certain airplane stabilizers fixed in an oral agreement with an authorized representative of the Government is understood to be based, in part, upon previous experimental and development expenses, under the direction of authorized representatives of the Government, and where after the delivery of two stabilizers, which are paid for at the contract price, the contract is cancelled, and a partial award made and accepted in which the question as to the liability of the Government for such expense is left open, the contractor is entitled to recover such part only of the preliminary engineering and development work as is directly applicable to the order on which the claim is based.
2. **ENGINEERING AND DEVELOPMENT EXPENSES.**—Where claimant had perfected a lateral stabilizing device for airplanes, and at the request of duly authorized representatives of the Government made further experiments and incurred additional expense in developing a device which was satisfactory for both lateral and longitudinal movements, claimant may recover such expenses as were reasonably necessary to be incurred in perfecting such stabilizer as are directly applicable to the order upon which the claim is based, but can not recover for expenses incurred in order to produce the device first offered to the Government, nor expenses incident to obtaining foreign patents.

Mr. Bayne writing the opinion of the Board.

This is a claim, class B, which comes to this Board for consideration upon the recommendation of the War Department Claims Board contained in an award to the claimant by the Secretary of War, through the War Department Claims Board, in the sum of \$74,763.72, in full adjustment, payment, and discharge of all damage sustained by claimant by reason of the cancellation of the contract between the claimant and the Government for 100 Macy manual electrical controls for \$2,500 each, excepting, however, "such expenditures and obligations incurred as may later be found due to claimant for preliminary engineering and development work directly applicable to the order on which the claim is based." The amount of the claim for such development, expenditures, and obligations by the claimant is \$155,290.65.

There has been a hearing on this claim.

This Board finds the following to be the facts in this claim.

FINDINGS OF FACT.

1. The claimant, having a patented device for stabilizing air-planes, applied to the Air Service of the War Department to purchase its device for use on airplanes. Tests were made at Mineola, N. Y., October 7, 1916, and at Langley Field, Hampton, Va., on November 13, 1917, upon which reports were made, showing that the lateral movement was stabilized by the device, but the Department desired an additional device for the purpose of stabilizing the longitudinal movement and did not accept the device for the lateral movement alone.

2. Claimant declined to incur further expense in developing the device so as to include longitudinal stabilization unless the Government gave claimant an order for 100 of the devices so completed, at \$2,500 each, if found satisfactory. Col. E. A. Deeds, chief of the Equipment Division of the Signal Corps, agreed to this on or about October 1, 1917, and claimant thereupon undertook to complete its device for both lateral and longitudinal motions. Thereafter claimant presented its device so completed to Col. Deeds who accepted the device and directed the issue of an order to claimant accordingly.

3. Thereafter A. C. Downey, major, Signal Corps, for the Chief Signal Officer, placed with claimant an order dated December 20, 1917, and numbered 20,356, for 100 of these manual electrical controls at the price of \$2,500 each.

4. Thereafter claimant delivered to the Bureau of Aircraft Production two of these completed controls which were accepted after test. These were paid for and apparently complied with the requirements and purposes of the order.

5. Thereafter and on October 14, 1918, Mr. William C. Potter, Acting Director of Aircraft Production, wrote claimant as follows:

"1. Referring to order 20356, covering one hundred (100) Macey manual electrical controls for Curtiss, Handley-Page, and Caproni planes, you are advised that it is the desire of the Bureau of Aircraft Production to effectuate a cancellation of said order.

"2. It is our desire to accept and pay for such controls as have been delivered to date, and to negotiate a fair cancellation as to the remainder of the order. It is therefore requested that you incur no further expense in connection with this order and that we be advised in the near future as to the basis of settlement which will be satisfactory to your company."

6. Claimant thereupon accepted the cancellation and filed its claim for adjustment with the Air Service Claims Board.

7. Claimant completed four of the devices which one of claimant's witnesses said were about the size of his thumb. The Government estimated that it would cost \$35,000 to finish the contract, but claimant ascertained that it would cost about \$20,000 to do so.

8. Thereafter claimant made its application for damages to the Air Service Claims Board which recommended an award in the sum of \$74,763.72 covering the actual cost of production. This award was made by the War Department Claims Board on June 26, 1919. The award included interest allowed in the sum of \$10,508.49, which had accrued on loans made for the purpose of producing the equipment before the award, but it did not include any allowance for experimental engineering and development.

9. The Air Service Claims Board found with reference to the claim for preliminary engineering and development expenses that although it appeared that the price of \$2,500 for each instrument had been agreed upon with a view to reimburse the claimant for development work, there was no written evidence dated prior to the act of March 2, 1919, indicating this fact, and, further, that there was not sufficient evidence to determine which part of the experimental engineering for which reimbursement is claimed, was applicable to the claim in accordance with the provisions of the Dent Act.

10. The Air Service Claims Board was further of the opinion that it was not vested with any legal authority to determine any allowance to be made to claimant because of development expenses, inasmuch as such determination would apparently have to be ascertained through oral evidence. It therefore was decided that, in accordance with request of claimant, the case should be referred to the Board of Contract Adjustment for further determination as to this feature of the claim.

11. Upon the recommendation of the Air Service Claims Board, the War Department Claims Board made an item payment award of the War Department Claims Board contained in the following language:

"That an adjustment, payment or discharge of said agreement upon a fair and equitable basis will include the allowance to the claimant of the sum of \$5,000 representing reimbursement for 2 Macy manual electrical controls for Curtiss R-4 airplanes already delivered, plus the sum of \$79,116.71, or a total amount of \$84,116.71, with respect to the following separable item:

"All expenditures and obligations incurred with the exception of such expenditures and obligations as may later be found due the claimant for preliminary engineering and development work directly applicable to the order on which the claim is based.

"From the said amount of \$79,116.71 shall be deducted the amount of \$4,352.99, and in lieu thereof the Secretary of War hereby awards to the claimant the property listed in report hereby attached, and this award shall operate to vest in claimant title to such property."

12. The award further stated:

"That there is not included in this award by itself, or together with awards heretofore made with respect to said agreement, any

prospective or possible profits on any part of said agreement beyond goods and supplies delivered to and accepted by the United States thereunder and a reasonable remuneration for expenditures for obligations or liabilities necessarily incurred in performing said agreement."

13. The amount thus awarded to claimant was the net sum of \$74,763.72.

14. This award, dated June 26, 1919, was accepted by claimant, and the sum awarded was duly paid claimant.

15. The question thus submitted to this Board by the War Department Claims Board is whether "expenditures and obligations later found due to the claimant for preliminary engineering and development work directly applicable to the order on which the claim is based," for the purpose of perfecting the devices, which are not included in the award already made claimant, may be lawfully included in the damages sustained by claimant on the cancellation of its contract with the Government.

16. Claimant alleges that in fixing the price of \$2,500 for each of the said 100 controls which the Government agreed to pay, claimant included in said aggregate price not only the expenses in question, but also all the expenses of every kind claimant had incurred in experimenting with and in developing its original device, as well as the expense of obtaining the patent therefor in this country and in foreign countries, all of which were incurred prior even to offering the said original device to the Government.

17. The items constituting the claim for development expenses are stated by claimant in its petition as follows:

Purchase of aeroplane "T. T. special Martin tractor"-----	\$7,065. 75	
Employment of aviator for field flying-----	4,480. 00	
Drafting expenses -----	2,000. 00	
Manufacture of devices by others than ourselves-----	11,648. 62	
Demonstration expenses, including manufacturing wages, fees, etc., San Diego, Mineola, and Langley Fields, not including anything for salaries or compensation of officers or officials -----	41,951. 53	
Building hangar at Philadelphia for storage of aeroplane-----	600. 00	
Total -----		\$67,745. 90
Executive salaries -----	25,000. 00	
Legal expenses -----	18,544. 75	
Total -----		43,544. 75
Expenses of John A. Wilson-----		44,000. 00
Total -----		155,290. 65

18. Beyond the allegation in the petition of claimant as to these amounts and the papers in the file of the claim, there was no evidence produced before this Board of the reasonableness or of the necessity of the said several amounts as development expenses, nor was there any detailed statement of the items composing the same, offered in evidence at the hearing.

19. The evidence does not show what "expenditures and obligations" were incurred by claimant "for preliminary engineering and development work *directly applicable* to the order on which the claim is based."

20. It thus appears that at the time claimant approached the Government for a contract for the device claimant then wanted to sell, development expenses had already been incurred, and of course before claimant had any contract with the Government, and before the Government had done anything which induced claimant to incur such expenses. The nature and amount of these expenses so incurred do not appear either from the statement of claim or from the evidence.

21. It also appears that after claimant approached the Government for a contract for its device for lateral stabilization alone, which was unacceptable to the Government, and after Col. Deeds promised to give claimant a contract for 100 devices for the control of both lateral and longitudinal movements, if found satisfactory, and before the contract was actually given, claimant apparently incurred certain expenses in further developing the device. But what these expenses were, subsequent to the promise of Col. Deeds, but before the giving of the contract in satisfaction of that promise, does not appear.

DECISION.

1. Damages are awarded to a party to a contract which has been broken by the other party thereto, fundamentally because the innocent party has changed his position on account of the contract for the worse if the other party breaks it. The damage from a breach flows from reliance on and by reason of the contract, and therefore expenses occurring before the contract and not on account thereof can not ordinarily be included in the damages because such expenses, as a loss, would exist even if the contract had never been made. Hence such expenses can not be said to be caused by either the contract or the breach thereof.

2. Thus, to illustrate by the selection of one of the amounts, claimed in this case as one of the elements of claimant's damages from the failure of the Government to carry out its contract with claimant, the sum of \$18,544.75, "legal expenses," was the amount paid to claimant's counsel for services in procuring patents for the device in question in this and foreign countries some considerable time before the contract here was made. It can not be said, of course, that the breach of the contract was in any degree the cause of the expense to claimant, nor, broadening the illustration somewhat, can it be said that the expense of building a factory in anticipation of procuring contracts to sell the product thereof, is a proper element in the dam-

ages from the breach of one of the contracts subsequently made for the purchase of such products, though depreciation in the use of the plant in performing the contract may be included.

3. The true principle is that damages from the breach of a contract can include only such loss as was incurred by reason of and in consequence of the contract and approximately growing out of that breach. Indeed, the Dent Act specially provides that some of the expenditures must have been made and the obligations must have been incurred "upon the faith of the agreement" though not all of them need necessarily have been incurred before the armistice nor after the contract was made or promised. (*In re Piqua Hosiery Co.*, Case No. 150-C-57-B, Decisions of Board of Contract Adjustment, Vol. I, p. 113.)

4. Applying the rule to this case, it can not be said that the expenses, engineering and experimental, incurred by claimant prior to even approaching the Government on the subject of a contract, were incurred on account of the contract in question, because it was not then in contemplation, no representation or promise had then been made by the Government, and for aught that then appeared the contract might never have been in existence.

5. It follows that all such expenses incurred prior to seeking the contract from the Government must be eliminated from the damages sustained by claimant from the breach of the contract. (*Berkshire Magneto Co.*, Case No. 150-C-501, decided by this Board Oct. 15, 1919.)

6. We must therefore eliminate from the claim all items for expenses by claimant for all development, experiment, and engineering incurred in order to produce the device first offered to the Government and rejected by it. Such expenditures are not "directly applicable to the order on which the claim is based."

7. All development expenses prior to even approaching the Government for a contract, having to be eliminated from the claim, because they were not incurred in contemplation of the contract conditionally promised and afterwards actually made, the inquiry now only to be made is whether development expenses subsequently incurred after and because of the Government's contract to give claimant a contract if the device were perfected and found satisfactory, and directly applicable to the order, may be allowed as a part of claimant's damages.

We think the decision of this Board in the case of *Berkshire Magneto Co.*, No. 150-C-501, decided October 15, 1919, is authority for answering this question in the affirmative.

8. It therefore follows that such reasonable and necessary expenditures and obligations, if any, not already included in said award, as were incurred by claimant "for preliminary engineering and devel-

opment work directly applicable to the order on which the claim is based " as above indicated, should be ascertained by the Air Service Claims Board on the lines described in Supply Circular No. 111 and when so ascertained should be added to the award already paid claimant as the final item of its damages arising from the cancellation of the said order.

DISPOSITION.

This Board directs that this claim be remitted to the Air Service Claims Board to ascertain, on the lines indicated in Supply Circular No. 111, the reasonable and necessary expenditures, if any, incurred by claimant, not included in the award already made to it, for preliminary engineering and development work done by claimant directly applicable to the order on which the claim is based, as indicated in the above decision.

Col. Delafeld, Mr. Hunt, and Mr. Eaton concurring.

Case No. 1736—Part I.

In re CLAIM OF HENRY KNIGHT & SONS (INC.).

1. **CONSTRUCTION—WASTE MATTER.**—Where claimant entered into a formal written contract with the United States Government to purchase and remove "all waste matter of every kind and nature, except rags, bags, manure, and cinders," at a camp, such words as used in the contract include all such matter as is generally called "waste matter," and the United States Government is indebted to the claimant in the amount received from the sale of such waste matter at such camp prior to June 30, 1918, the expiration of claimant's contract, and claimant is entitled to such waste matter as had accumulated prior to that date and is still at said camp undisposed of.
2. **FORMAL CONTRACT—JURISDICTION.**—Where there is a doubt as to the construction of such written formal contract or a question as to whether the United States Government has paid all that it is under an obligation to pay, in accordance with the terms thereof, the Board of Contract Adjustment has jurisdiction under General Order 103 of 1918 to advise the Secretary of War as to his duty in such case and as to what are the legal obligations of the United States Government under such contract.
3. **CLAIM AND DECISION.**—This claim arises under General Order 103 and is presented upon the theory that the United States Government is obligated under a formal written contract to pay claimant for certain waste matter sold at Camp Gordon, and also that claimant is entitled to certain waste matter at such camp, that accumulated prior to June 30, 1918, the expiration of claimant's contract. Held, that the Board of Contract Adjustment has jurisdiction to adjust the claim and that under the contract claimant is entitled to payment for such waste matter as was sold by the Government, and is entitled to such waste matter as now is at said camp, which accumulated prior to June 30, 1918.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim is presented in accordance with General Order 103, War Department, 1918, and is for \$5,746.92, under the following circumstances:
2. A formal contract was entered into between the claimant and the United States dated August 28, 1917, in relation to the removal of waste matter from Camp Sherman, Chillicothe, Ohio. This contract is identical in language with that referred to in our decision in respect to the contract between the same claimant and the United States for the removal of waste from Camp Joseph E. Johnston, Jacksonville, Fla. The issues of fact dealt with by us in the

decision in respect to that contract are the same issues as those that arise in respect to the contract for the removal of waste from Camp Sherman. At Camp Sherman, as at Camp Johnston, the camp officers took possession of and sold articles of waste matter which by the true construction of the contract belonged to the claimant. The amount realized from the sale of waste matter that belonged to the claimant at Camp Sherman was \$5,746.92. It is agreed that there was no breach of the contract by the claimant and that no ground for a counter claim exists on the part of the United States.

DECISION.

1. The decision of this Board rendered in respect to the Camp Johnston contract bearing the same number, to wit, 150-C-1736, governs our decision in respect to the contract for the removal of waste at Camp Sherman. The contractor is entitled to the amount realized and collected by the United States in selling articles of waste to which the claimant was entitled. This amount is not in dispute but was determined by the Inspector General and the claimant is entitled to it. The amount is \$5,746.92.

2. The claimant is also entitled to certain items of waste matter listed by the camp inspector and now in the custody of the camp officers at Camp Sherman. These articles should be turned over forthwith to the contractor for the same disposition.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, for appropriate action.

Col. Delafield, Mr. Williams, and Mr. Shirk concurring.

Case No. 1736—Part II.

In re **CLAIM OF HENRY KNIGHT & SONS (INC.).**

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim is presented in accordance with General Order 103, War Department, 1918, and is for waste matter in the custody of the United States under the following circumstances:

2. A formal contract was entered into between the claimant and the United States dated August 28, 1917, in relation to the removal of waste matter from Camp Jackson, Columbia, S. C. This contract is identical in language with that referred to in our decision in respect to the contract between the same claimant and the United States for the removal of waste from Camp Joseph E. Johnston, Jacksonville, Fla. The issues of fact dealt with by us in the decision in respect to that contract are the same issues as those that arise in respect to the contract for the removal of waste from Camp Jackson. There was no sale by camp officers of any articles of waste to which the claimant is entitled. There are several items of waste matter listed by the camp inspector now in the custody of the camp officers to which the contractor is entitled. It is agreed that there was no breach of this contract by the claimant and that no ground for a counterclaim exists on the part of the United States.

DECISION.

The decision of this Board rendered in respect to the Camp Johnston contract bearing the same number, to wit, 150-C-1736, governs our decision in respect to the contract for the removal of waste at Camp Jackson. The articles of waste which have been listed by the camp inspector and are now in the custody of the camp officers should be delivered to the claimant.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, for appropriate action.

Col. Delafield, Mr. Williams, and Mr. Shirk concurring.

Case No. 1736—Part III.

In re **CLAIM OF HENRY KNIGHT & SONS (INC.).**

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim is presented in accordance with General Order 103, War Department, and is for \$590.97, under the following circumstances:

2. A formal written contract was entered into between the claimant and the United States dated August 28, 1917, and related to the removal of waste from Camp Joseph E. Johnston, at Jacksonville, Fla. (On or about the same date three other contracts were entered into between this claimant and the United States which were substantially identical with the one now being considered and provided for the removal of waste from Camp Sherman at Chillicothe, Ohio, Camp Jackson at Columbia, S. C., and Camp Gordon at Atlanta, Ga. The issues of fact that are presented in respect to the contracts for the removal of waste at Camp Sherman and Camp Jackson are not different from those presented in respect to the contract for removal of waste from Camp Johnston. Separate contracts were entered into and it is necessary to prepare separate findings and separate decisions in respect to each contract. The situation at Camp Gordon is different in some respects and a separate decision is made in respect to the contract for the removal of waste from Camp Gordon.)

3. By the terms of the contract the contractor paid \$0.04 per month for each soldier and each person in the Government service at Camp Johnston. The contract reads:

“I. The contractor agrees to purchase and remove all waste matter of every kind and nature, except rags, bags, manure, and cinders, from Camp Johnston, Jacksonville, Florida.

“II. All such waste matter produced at said camp shall be collected by the United States in its own receptacles and delivered to the contractor at some point within the reservation to be designated by the commanding officer in charge.”

4. A question of construction arose as to the meaning of the words in the first paragraph of the contract, “all waste matter of every kind and nature except rags, bags, manure, and cinders.”

5. The Judge Advocate General on March 4, 1918, wrote an opinion as to the construction of the contract between the United States

and the United Disposal & Recovery Co., which was identical in language with the instant contract with the claimant. On November 22, 1918, the Judge Advocate General sent his opinion to The Adjutant General in respect to the contract with the claimant, and stated that his opinion under date of March 4, 1918, covered the situation.

6. The opinion of the Judge Advocate General was that the words "all waste matter of every kind and nature, except rags, bags, manure, and cinders," included as used in this contract all such matter as is usually called "waste matter." Some of the waste matter which was usually called "waste matter" was allowed to accumulate at Camp Johnston, and some was sold by the camp officers, and the sum of \$590.97 was realized therefrom and paid to the Treasury of the United States.

7. As soon as the opinion of the Judge Advocate General was received it was ordered by the Inspector General's Department that an inspection and audit of the books should be made at Camp Johnston, and that a determination should be reached as to the amount received by the United States from the sale of articles of waste that should have been delivered to the claimant. A careful inspection was made, and it was determined that the United States had realized the sum of \$590.97, as above stated, from the sale of articles of waste to which the claimant was entitled. It was also determined that there were other articles of waste, some of which were in the custody of the officers at Camp Johnston, and some of which were at the salvage base at Atlanta, Ga.

8. A careful inspection was also made, testimony taken, and reports received as to whether or not there was any breach of contract by the claimant and to see if there was any ground for a counterclaim against it by the United States. It was determined that the contractor had performed its contract in all respects and that no valid counterclaim on the part of the United States existed.

DECISION.

1. The opinion of the Judge Advocate General is that the words "all waste matter of every kind and nature except rags, bags, manure, and cinders" include, as used in this contract, all such matter as is usually called "waste matter." With this opinion we concur. It is indubitably correct.

2. The claimant is therefore entitled to have delivered to it all such waste matter including metal and rubber waste that accumulated during the life of the contract between August 28, 1917, and June 30, 1918, and has not been sold by the United States. This will include such waste matter as is now in the custody of the officers at

Camp Johnston and also such waste matter as was sent to the salvage base plant at Atlanta, provided, of course, this material had accumulated prior to June 30, 1918. The record shows that the material to which the claimant is entitled has been separated under the direction of the Inspector General's Department and is in such condition that it can be delivered to the claimant as soon as the proper authorities accede to its delivery. As to the articles of waste just mentioned no question arises. The claimant is clearly entitled to them, and it should be allowed to take possession of them forthwith.

3. The question of whether or not payment should be made to the claimant of the amount received by the United States from the sale of articles of waste to which the claimant was entitled raises a somewhat different question. It is argued that there was a breach of contract by the United States which resulted in a claim on the part of the claimant against the United States for unliquidated damages, and that the measure of damages to which the claimant is entitled is not the amount received by the United States from the sale of the waste, but that the contractor is entitled to receive a fair value of the articles sold.

4. The first point to be determined is whether or not there was a breach of contract by the United States. It is clear that there was no intentional breach on the part of any of the officers of the Government. The officers of the camp in good faith and with the acquiescence of the claimant made a sale of accumulated waste material. The claimant appears to have been satisfied to have the waste material sold and pending a construction of the contract it was evidently necessary that some disposition be made of a large accumulation of junk. There was no express agreement between the claimant and the officers of the camp, but the evidence warrants a finding that the sale of the waste material by the camp officers was not thought of as a breach of contract either by the officers or by the claimant. The sale resulted in the receipt of a fund which the United States would be entitled to keep if the true construction of the contract was as understood by the officers of the camp, and on the other hand, it is a fund which should later be paid to the claimant if it is determined that it was entitled to the waste material sold. The question therefore is not one of damages, liquidated or unliquidated, but a question of performance of the contract. It is our duty under General Order 103 "to hear and determine all claims, doubts, or disputes, including all questions of performance or nonperformance, which may arise under all contracts made by the War Department." The question is one of performance and we determine that the United States, in performance of its contract with the claimant, should pay to it the amount that the United States has received from the sale.

of waste material to which the claimant was entitled, and should deliver forthwith to it the articles of waste above referred to.

5. If the question was one of damages, which it is not, the least amount to which the claimant is entitled is the amount realized by the United States on the sale of articles that belonged to the claimant. If there had been a breach of this contract by the Government and a suit brought to recover damages for the breach the claimant might be entitled to receive a fair and reasonable value of the articles sold, but it would be entitled as a minimum amount of damages to the amount received by the United States. The claimant asks for the amount received by the Government for the sale of articles that really belonged to it and which everybody now agrees belonged to the claimant. There is nothing unliquidated and there is no dispute that the amount received from the sale of waste which was the property of the claimant is \$590.97, and the claimant is entitled to that amount.

6. As there is no evidence on which a counterclaim against the contractor on the part of the United States can be based there is no doubt as to the jurisdiction of this Board to determine this claim. The evidence is full, the record complete, the claim has been passed on by many departments of the Government, and this decision is in accordance with the recommendation of all the officers of the War Department who have considered the circumstances.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, for appropriate action.

Col. Delafield, Mr. Williams, and Mr. Shirk concurring.

Case No. 1736—Part IV.

In re **CLAIM OF HENRY KNIGHT & SONS (INC.).**

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

This claim is presented in accordance with General Order No. 103, War Department, 1918, and is for \$835.40 under the following circumstances:

1. A formal contract was entered into between the claimant and the United States, dated August 28, 1917. By the terms of the contract the contractor paid \$0.04 per month for each soldier and each person in the Government service. The contract expired by its terms on June 30, 1918. In return for this payment the contractor was to receive all waste matter that was produced at Camp Gordon, Atlanta, Ga., with certain exceptions, as stated in the contract. (Note.—The contract in respect to removal of waste from Camp Gordon was entered into at the same time as contracts for the removal of waste from Camps Johnston, Sherman, and Jackson. It is dealt with separately for the reason that there is a suggestion in the record that the contractor did not perform this contract completely in all respects.)

2. The contract reads:

“I. The contractor agrees to purchase and remove all waste matter of every kind and nature, except rags, bags, manure, and cinders, from Camp Gordon, Atlanta, Georgia.

“II. All such waste matter produced at said camp shall be collected by the United States in its own receptacles and delivered to the contractor at some point within the reservation, to be designated by the commanding officer in charge.”

Paragraph III provided for the time and manner of removal of waste.

Paragraph IV provided for the terms of payment by the contractor.

Paragraph V is as follows:

The following classes of waste shall be collected and delivered to the contractor in separate receptacles: (a) Bones, (b) fats and tallows, (c) all other garbage, (d) paper, (e) bottles, (f) rope or twine, (g) cans.

Paragraph VI provided that dead animals should be removed by the contractor and become his property.

3. A question of construction arose as to the meaning of the words in the first paragraph of the contract, "all waste matter of every kind and nature, except rags, bags, manure, and cinders."

4. The opinion of the Judge Advocate General was asked in respect to the construction of this contract. On November 22, 1918, S. T. Ansell, Acting Judge Advocate General, wrote an opinion to The Adjutant General that the question was covered by the opinion of The Judge Advocate General's office dated March 4, 1918. The opinion of March 4, 1918, was given in respect to the construction of a contract between the United States and the United Disposal & Recovery Co. The terms of that contract are identical with the terms of the contract shown in the present case. The opinion of the Judge Advocate General was that the words "all waste matter of every kind and nature, except rags, bags, manure, and cinders" included as used in this contract all such matter as is usually called "waste matter."

5. The contractor collected certain kinds of waste during the life of the contract. On June 30, 1918, when the contract expired by limitation, there were at Camp Gordon, in the custody of the salvage officer, many articles that came within the definition of "waste material" as that term is construed by the Judge Advocate General. Since that date some of these articles have been sold by the Government officers and the money received from the sale has been deposited in the Treasury of the United States. Some of the articles of waste are still on the ground at Camp Gordon. After the opinion of the Judge Advocate General was received a thorough investigation of the waste at this camp was made under the direction of the Inspector General of the Army. It was determined by the Inspector General that the amount due the claimant in respect of the waste that he should have received, but did not receive, was \$835.40.

6. The question of whether or not there was any basis for a counterclaim on the part of the Government against the claimant arose in January, 1919. The Inspector General's Department was directed to make an investigation and report on the condition of things at Camps Gordon, Jackson, Johnston, Sherman, Custer, and Dodge. This investigation was directed by the Inspector General's Department, and reports were made and submitted to the Judge Advocate General. The Judge Advocate General indorses on the reports of the inspection at Camp Gordon the following:

"Camp Gordon: Contractor entitled to damages in an unliquidated amount for breach of contract by the United States in failing to deliver waste afterwards sold for \$835.40. This claim he must file with the Auditor for the War Department. Uncertain quantity of 'waste matter' in yards of utilities officer at Camp Gordon. Un-

certain quantity of 'waste matter' in yards of constructing quartermaster at Camp Gordon. Counterclaim of uncertain amount."

Under date of June 17, 1919, there is a memorandum from the Chief of Staff, signed by Robert E. Wyllie, colonel, General Staff, chief equipment branch, to whom were referred all the reports and opinions and papers and who reached conclusions in all of the cases. He recites the conclusions of the Judge Advocate General, which are to the effect that he concurs in the findings of the Inspector General. Col. Wyllie's conclusions are as follows:

"It will be noted from the above that the Judge Advocate General consistently and continually concurs in the recommendations of the Inspector General's Department, but in every case speaks of the damages to which the contractor is entitled as 'in an unliquidated amount,' and states that the claims must be filed with the Auditor for the War Department.

"8. In a conference between the claims officer of the Auditor for the War Department (Mr. Crittenden's office) and a member of the equipment branch of the Operations Division (Col. Hickman) the fact developed that the auditor does not handle unliquidated claims, but states that they must be taken up through the courts for adjustment and settlement. On this account it would be useless as a means of prompt settlement for these claims to be referred to the Auditor for the War Department, as recommended by the Judge Advocate General.

"9. The equipment branch is of the opinion that there is sufficient evidence in these papers throughout to indicate that the contractors are entitled to certain property now in the hands of the Salvage Division in the various camps named and to refund of certain amounts of money that resulted from sale of waste materials to which the contractors were justly entitled under the terms of their contracts.

"10. The equipment branch further believes that it is not good policy to further prolong the adjustment and settlement of such claims as are herein presented nor is it in conformity with the apparent desire of all concerned to settle war contracts as expeditiously as possible. It is believed that the recommendation of the Judge Advocate General to place these claims classed as unliquidated by him in the hands of the Auditor for the War Department, who can not settle unliquidated claims, would but delay the settlement of such claims which the Inspector General as a more or less disinterested party in the proceedings has found to be justly due the contractor.

"11. A further postponement of the settlement of these claims will result also in the scattering, loss, and further unauthorized disposition by the Salvage Division of such waste material that has been found due the contractors as a result of this investigation, and would further complicate the situation and add to an increased monetary liability of the United States in connection with this settlement.

"12. The equipment branch of the Operations Division is of the further opinion that if Mr. Gardy Cary, attorney for the contractors—Henry Knight & Son (Inc.) and the United Disposal & Recovery Co.—will agree to accept the property still in the camps and the money resulting from the sale of waste as determined by the

Inspector General's Department in the several reports herewith, as payment in full, in adjustment of these contracts, that it would be to the best interest of all concerned to effect such a settlement.

"13. Action is recommended at this time as shown by memorandum to The Adjutant General of the Army herewith."

7. The contract was terminated on June 30, 1918. The contractor has not received all of the waste that it was entitled to. A part of this waste has been sold by the United States and the sum of \$835.40 has been received by the United States Treasury. Other articles of waste are still on the ground at Camp Gordon and belong to the contractor. On the other hand there is a possibility that a counterclaim might be made against the contractor for a breach of contract. The commanding officer at Camp Gordon states that there is no ground for complaint against the contractor, that on the contrary it performed its contract fully and completely in accordance with its terms. The claim has been passed back and forth between various departments of the Government, the last departmental act and the one that was intended to be the final decision is to the effect that the United States has no reasonable grounds for a counterclaim against the contractor and that it is to the interest of the United States that payment be made forthwith of its obligations. The amount due the contractor as fixed by the Inspector General's Department on account of the sale by the United States of articles that belonged to the contractor is \$835.40. It is agreed by all concerned that the waste material now on the grounds at Camp Gordon, which had accumulated prior to June 30, 1918, belongs to the contractor—that is, the title to these articles has passed from the United States to the contractor—or that delivery should be made forthwith by the United States to the contractor of these articles, so that the title to the articles would pass to the contractor beyond the possibility of question.

8. The statement of Col. Thomas, camp quartermaster at Camp Gordon, is quoted below:

JULY 2, 1919.

[Memorandum for Col. Hickman.]

1. Reference your request that I prepare for you a statement covering the Henry Knight & Sons garbage contract at Camp Gordon, Ga.

2. I was the camp quartermaster at Camp Gordon from August 1st, 1917, to May 30, 1918, and I am at a loss to understand the statement in this paper covering Camp Gordon, where it says Knight & Son repeatedly failed to comply with the terms of their contract. Their representative was in my office almost, if not, daily to find out if everything was satisfactory, and to get any instructions I might have for him. The contract called for the delivery of the garbage to the transfer station by the Government, and Knight & Son to receive same there. This they did to the satisfaction of the

commanding general, and the sanitary officer in charge of the transfer station, and no complaint was made to me that Knight & Son were not complying with their contract.

3. They furnished metal-bodied covered trucks to take the garbage out of camp, as recommended, and I believe did everything possible to carry out their contract, and did do so. I feel that this statement is due to the contractor of garbage at Camp Gordon, Henry Knight & Son, from me, as I was the quartermaster, and I take pleasure in making same.

(Signed) C. O. THOMAS, JR.,
Colonel, Q. M. C.

DECISION.

1. General Order 103 reads as follows:

“It shall be the duty of the Board to hear and determine all claims, doubts, or disputes, including all questions of performance or non-performance which may arise under all contracts made by the War Department.”

In cases where the United States has committed a breach of a formal contract and the amount which is due from the United States on account of this breach is unliquidated it becomes a matter for the courts, and this Board may not determine the amount which the United States should pay as damages for its breach of contract.

2. On the other hand, when there is a doubt as to the construction of a formal contract or a question of whether or not the United States has paid all that it is under an obligation to pay in accordance with the terms of the contract, then it is the duty of the Secretary of War and within his power to obtain the advice of the proper agencies of the United States as to the legal rights and obligations that have arisen. It is the duty of this Board and a part of its jurisdiction to advise the Secretary of War as to his duty in such cases and as to what are the legal obligations of the United States. The present case is a typical instance of the class of case last referred to. A doubt has arisen as to whether or not the Government has fully performed its agreement with the contractor, and that doubt is to be resolved by a determination of the legal construction of the contract and specify what the words “all waste matter of every kind and nature, except rags, bags, manure and cinders” mean. It is our duty to determine that question and advise the Secretary of War as to what, in our opinion, is the correct legal construction of the words as used in the formal contract.

3. Our determination of the question is not what is usually meant by a determination, as it is only advisory to the Secretary of War, and it states the view of the board as to a legal question which has been referred to it by the head of the War Department. The Secretary of War may ask for the advice of other agencies of the Govern-

ment as to the true construction of this contract. In this case that has been done and the Judge Advocate General has given his opinion as to the construction of the contract.

4. The Judge Advocate General holds the view that the words "all waste matter of every kind and nature, except rags, bags, manure, and cinders" include as used in this contract all such matter as is usually called "waste matter."

5. It is our opinion that the words "all waste matter of every kind and nature, except rags, bags, manure, and cinders" include as used in this contract all such matter as is usually called "waste matter." It may be said that it is difficult to see how any other construction could ever have been put upon the contract and to appreciate how such a confusion has arisen in respect to performance as that which has arisen.

6. It follows, therefore, that the United States owes the claimant the amount which the Government received for the sale of waste matter that should have been delivered to the claimant in accordance with the terms of the formal contract, and it also follows that the claimant is entitled to such waste matter as had accumulated prior to June 30, 1918, and is still at the camp undisposed of.

7. It is not a question of liquidated or unliquidated damages. It is a question of performance by the United States of the obligation imposed upon it by the contract. Where the word "damages" is used it connotes a breach of the contract. The United States has committed no intentional breach of its contract. It has been in doubt as to what the contract meant. Now that it has learned through the proper channels what the true construction of the contract is it is desirous of meeting its obligations. They are fixed, certain, and "liquidated." The claimant does not allege any breach of contract by the United States. Its position is that the officers of the United States in making a sale of the waste material acted with its consent in preventing loss and in creating a fund the ownership of which could only be determined when the construction of the contract was determined.

8. There remains to be considered the question of a possible counterclaim by the United States against the claimant on the ground that the claimant has broken its contract and not fully performed its obligations thereunder. The difficult question is to determine whether or not there are reasonable grounds for a counterclaim. That depends, of course, upon what the evidence is that the contractor has broken its contract. It is a part of the duty of this Board to determine after an examination of the records and evidence before it whether or not it is their opinion that the contract has been broken by the contractor; and if so, whether the breach is a material one or one on which a valid action could be maintained by the United

States against the contractor. In determining this question the Board will be guided largely by the reports of the proper departments of the Government. The Inspector General's Department states that the contractor "repeatedly failed to comply with the terms of said contract, and it would have been utterly unable frequently to continue operations without the assistance of the Government." The memorandum to The Adjutant General dated June 18, 1919, signed by Henry Jervey, major general, United States Army, Assistant Chief of Staff, Director of Operations, shows that the whole matter has been carefully considered, including the report of the Inspector General, the indorsements of the Judge Advocate General, the reports of the Equipment Division, etc., and recommends as a final disposition of all questions arising in respect to this contract and five others like it, which apply to five other camps, that a letter be written to the attorney for the claimant as follows:

"5. Under all the circumstances presented in the case in question, the War Department does not feel justified in attempting to establish or press a counterclaim for failure on the part of your clients (the claimant and others) to carry out their part of the contract, provided they will accept settlement as hereinabove set forth."

9. We have, then, as a final determination by that branch of the War Department to whom this case was referred, that the evidence of a breach of contract by this contractor does not justify the establishing or pressing of a counterclaim on the part of the United States.

10. We have examined the transcript of the testimony of the officers and men at Camp Gordon, together with the reports of the Inspector General's Department and other evidence on which the possible counterclaim of the United States is based by reason of an alleged breach of contract by the contractor. We concur with the view contained in the memorandum for The Adjutant General of June 18, 1919, signed by Maj. Gen. Jervey, above referred to, that the counterclaim of the United States has no merit. The testimony of officers and men at Camp Gordon demonstrates that the alleged breach of contract by this contractor was of small importance. The main ground for complaint is, that on some occasions on account of extremely stormy weather the roads near Camp Gordon reached such a state that they could not be used by the motor trucks of the contractor and that for that reason the contractor was aided in removing the garbage by some of the men and teams belonging to the camp. This all took place in the winter, and the contractor continued to perform its contract to the satisfaction of the commanding officer at Camp Gordon until June 30, 1918. If the breach had been a material one the United States could have canceled the contract at the time when the breach occurred, but it does not appear that any serious complaint was ever made to the contractor by an officer of

the Government or that at the time the alleged breach occurred that it was ever considered either by the officers at Camp Gordon or by the contractor as a breach of contract by the contractor.

11. If there had been any such failure on the part of the contractor as could reasonably be called a breach the evidence is conclusive that such failure was trifling in its character and has been waived by the officers of the Government. No other conclusion is possible in view of the above-quoted statement of Col. Thomas, who was the camp quartermaster from August 1, 1917, to May 30, 1918.

12. For these reasons, and in accordance with the views of the department to which this claim has been referred, we determine that no reasonable grounds for a counterclaim on the part of the United States exist in this case, and that the waste material that is now at Camp Gordon and at the salvage base plant at Atlanta, and that had accumulated prior to June 30, 1918, be delivered to the contractor, and it is also entitled to the sum of \$835.40.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, for appropriate action.

Col. Delafield, Mr. Williams, and Mr. Shirk concurring.

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Case No. 345.

In re CLAIM OF WELLINGTON, SEARS & CO. AS AGENTS FOR HAMILTON WOOLEN MILLS.

1. **CONTRACT TO FURNISH PURCHASERS—PART PERFORMANCE.**—Where the United States Government agreed to furnish claimant purchasers for 500,000 pounds of yarn, the consideration for the agreement being the promise of claimant to furnish the yarn to certain manufacturers doing Government work, the United States Government is under obligation, under the act of March 2, 1919, to reimburse claimant for its loss in expenditures necessarily made in preparing the portion of such yarn for which no purchasers were furnished.
2. **FAILURE OF PURCHASER TO PERFORM.**—Where, under such an agreement, a purchaser is produced who contracts with claimant to buy 200,000 pounds of yarn but only takes 75,000 pounds thereof, the United States Government is under no obligation, under the act of March 2, 1919, to claimant, by reason of the failure of such purchaser to perform its contract with claimant.
3. **REPUDIATION OF SUBCONTRACT—RIGHTS OF PARTIES.**—Where the United States Government suspends a contract, thereby causing the prime contractor to repudiate its contract with claimant to purchase 200,000 pounds of yarn, the United States Government is under no obligation, under the act of March 2, 1919, to find another purchaser for claimant for that portion of the yarn not taken by the prime contractor.
4. **CLAIM AND DECISION.**—This claim is presented under the act of March 2, 1919, upon the theory that the Government is obligated to reimburse claimant for expenses necessarily incurred in preparing yarn not taken under an agreement by the United States Government to furnish buyers for 500,000 pounds. Held, that claimant is entitled to an adjustment for its cost and remuneration on the part of the agreement as to which the Government failed to perform.

Mr. Shirk writing the opinion for the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arose under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17 for \$68,127.89 by an agreement alleged to have been entered into on July 12, 1918, between the claimant and the United States. The case comes to this Board on the claimant's appeal from the decision of the Claims Board, Director of Purchase disallowing its claim.

2. In the summer of 1918 there was a scarcity or threatened scarcity of wool suitable for the manufacture of Army clothing. The Quartermaster Corps was having Army clothes manufactured for it by various manufacturers and it was necessary for it to see to it that such manufacturers were able to obtain the necessary wool and yarn from some source; and if they could not be obtained from private

owners, demands necessarily would have had to have been made on the Government's own supply of wool. The Quartermaster Corps learned that the Hamilton Woolen Mills had a supply of wool suitable for the purpose.

3. That being the situation, Mr. Brooks, chief of the yarn section, wool, tops and yarn branch, Clothing and Equipage Division, Quartermaster Corps, on July 12, 1918, interviewed Mr. Slifer, a representative of Wellington, Sears & Co., the selling agents of Hamilton Woolen Mills. After that conference and on the same day Mr. Brooks wrote Mr. Slifer a letter confirming their arrangement of that day. Both gentlemen agree that that letter correctly states the arrangement which they had made. That letter was as follows:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL OF THE ARMY,
New York City, July 12, 1918.

From: Acting Quartermaster General.

To: Wellington, Sears & Company, 66 Worth Street, New York (attention of Mr. Slifer).

Subject: Yarn order with Hamilton Woolen Company.

1. Confirming arrangement made with your Mr. Slifer to-day, this branch confirms contract placed with the Hamilton Woolen Company as follows:

2. Hamilton Woolen Company are to furnish to customers designated by this branch 500,000 lbs. 2/20s worsted yarn, made out of class 4 South American wools, at a price of \$1.95 for white yarn, delivered in skeins, or \$2.17½ for standard O. D. mixture yarns, delivered on cheeses, terms 2% ten days or net sixty days, f. o. b. Southbridge, Mass., deliveries 15,000/20,000 lbs. weekly, starting August 15th, and 25,000/30,000 lbs. weekly, starting October 1st or sooner, if possible, in any case entire contract will be completed not later than January 15, 1919.

3. It is understood that not over 100,000 lbs. of the order may be taken in 2/24s white skein yarn at a price of \$1.97½.

4. This branch expects to place the order for 400,000 lbs. in white yarn and 100,000 lbs. in the O. D. mixture, although it is possible that all of the yarn may be needed in white, or that 300,000 lbs. may be needed in O. D. These particulars can be arranged at a later date.

5. It is understood that this contract will require no allotment of Government wool.

6. All orders and specifications regarding this contract will be taken up direct with you at your New York address, you in turn to communicate regarding same with the Hamilton Woolen Company.

By authority of the Acting Quartermaster General.

N. B. K. BROOKS,
Wool Top & Yarn Branch, C. & E. Division, Q. M. G. O.
NBKB:RN.

4. On the same day Mr. Brooks wrote to his chief, Mr. Albert W. Elliott, chief of the wool, tops, and yarn branch, some of the functions of which branch were to handle wool, top, and yarn affairs for the Quartermaster Corps, to procure the necessary supplies of these

materials and distribute them to manufacturers holding Government contracts which required the use of those materials, advising him of his arrangement with Wellington, Sears & Co. and inclosing a copy of the above letter of July 12. Mr. Elliott approved of Mr. Brooks's acts in the premises and was glad to get the promise of the yarn at that time.

5. The claimant concedes that thereafter and prior to the armistice the Government furnished to the Hamilton Woolen Co. purchasers for 334,600 pounds of yarn, but contends that the Government has since failed to furnish to it purchasers for the balance of 165,400 pounds of the 500,000 pounds referred to in the letter of July 12.

6. Wellington, Sears & Co. are the selling agents of the Hamilton Woolen Co., making collections from sales and remitting the proceeds to the Hamilton Co. after deducting therefrom their commissions.

DECISION.

1. We are of the opinion that the verbal arrangement of July 12, as shown by the letter of that date, amounted to a contract. There may be some doubt whether that contract was that the United States should purchase the yarn itself or that it would furnish to the company customers therefor. Any doubt in that regard we think has been removed, because the parties themselves, by their subsequent conduct, have construed the contract, and we think that the contract is in substance that the Government promised to furnish to the Hamilton Woolen Co. customers for 500,000 pounds of yarn in consideration of the promise of the company to furnish the yarn to such customers designated by the United States.

2. The Wellington-Sears Co. acted in the whole matter merely as the selling agent for its principal, the Hamilton Woolen Co., which is the real party in interest with which the contract was made. Any award in this matter should be to the Hamilton Woolen Co. and not to Wellington, Sears & Co.

3. The decision of the Claims Board, Director of Purchase, to the effect that no contract within the meaning of the act of March 2, 1919, existed, is hereby reversed.

4. The claimant seeks the opinion of this Board on several questions not necessary to the present disposition of this case, but the answering of which claimant feels would remove doubt and uncertainty in the negotiation of a settlement of the contract with the bureau Claims Board. One of the customers which the Government furnished to the Hamilton Co., pursuant to the agreement, was the Botany Worsted Mills, which thereafter contracted with the Hamilton Co. for some yarn. A dispute has arisen between them as to whether or not the Hamilton Co. has released the Botany Co. from

its obligation to take an undelivered balance of the yarn it contracted for and has further released it from all claims arising out of the matter except for yarn actually delivered. We think that when the Government furnished the Botany Co. as a customer, and the latter contracted with the Hamilton Co. for yarn the Government thereby fulfilled its obligation to the Hamilton Co. to the extent of the quantity so contracted for, and that if the Hamilton Co. subsequently released the Botany Co. the Government was and is under no obligation to furnish to it customers for the amount so released, and that if it has not released the Botany Co. that its remedy is against that company and not against the Government in this proceeding. We think that we should not attempt to decide whether there was a release, because, if for no other reason, the Botany Co. is not a party to this proceeding and has not been heard. But assuming that the Botany Co. has not been released, the Hamilton Co. contends that it should be able to recover directly against the Government in this proceeding for its loss on the undelivered portion of its contract with the Botany Co. on the theory that circuitry of action would be avoided thereby. That theory assumes that the Botany Co. was a prime contractor and that the Hamilton Co. was itself a subcontractor in that it undertook to furnish the Botany Co. with the yarn necessary to perform its prime contract with the Government. This proceeding, it must not be lost sight of, is based on an entirely different matter, namely, a separate and distinct contract of a different character directly between the Hamilton Co. and the Government. The contract which the claimant sets up here has no connection with the contract between the Government and the Botany Co., if one existed. The confusion arises from the fact that the claimant comes here on petition as a prime contractor and now, being here, seeks to get relief also as a subcontractor on another contract. It seeks to assume a dual rôle—its legitimate part as a prime contractor and its, in this proceeding, illegitimate rôle of subcontractor under the Botany contract.

5. The claimant took the position at the hearing and attempted to show that the Government canceled and rescinded the allocation by the Government to it of the Botany order to the extent of an undelivered balance of the Botany order, and that such action places the United States and the Hamilton Co. in the same position as though the Government had never furnished the Botany Co. as a customer for the amount of the undelivered balance of the Botany order. We do not think that the evidence is sufficient to justify that view.

6. The claimant says that (1) under its contract with the United States, customers for 165,400 pounds of yarn were never allocated to it; (2) under its contract with the Botany Co. it had not yet delivered

a balance of 125,006 pounds of yarn; and (3) in order to perform these two contracts it has certain materials which have been left on its hands and on which it has suffered loss. The question arises as to how this loss is to be distributed between these two contracts. It maintains that there should be no apportionment of any particular kind of materials left on hand to the Botany contract, but that of the materials left on hand an amount of each kind should be applied to the Botany contract in the proportion which the total amount undelivered under the Botany contract bears to the total amount unallocated plus the amount undelivered under the Botany contract, namely, 290,406 pounds. The claimant fears that on a negotiation of a settlement the bureau board will apply the more nearly completed materials, on which a greater loss was sustained, against the undelivered balance under the Botany contract, and will apply the less nearly completed materials, on which a loss not nearly so great was sustained, against the unallocated portion of its contract with the Government. The claimant therefore seeks a ruling from this Board in favor of its contention in advance of a negotiation with the bureau board. We think that the answer turns on a question of fact, namely, For the performance of which contract were these materials procured, prepared, set apart, or held? The loss on all of those materials which were in fact for the Botany contract should be applied on the Botany contract; and, similarly, the loss on all which were in fact for the unallocated portion of the Government contract should be applied on the Government contract. The complete circumstances and facts on this question are not before this Board, and what evidence was presented to it at the hearing was in effect given *ex parte*, because the Government had no notice that this issue was to be tried, and therefore was not in a position to attack the claimant's contention. We think that in the circumstances we should not embarrass the bureau board in its negotiation of a settlement by an expression of opinion in advance on what is substantially *ex parte* evidence. The bureau board should decide that question of fact on all the evidence which it may have or be able to obtain. In that connection it would be proper for it to consider the claimant's statement under oath as to the intended application of the various materials on hand, but such statement would not necessarily be conclusive.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate, Form C, to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield, Lieut. Col. Carruth, and Mr. Wise concurring.

Case No. 1456.

In re CLAIM OF CLEVELAND CITY FORGE & IRON CO.

1. **CONTRACT IMPLIED FOR INCREASED COST WHERE GOVERNMENT ORDERS CANCELLATION OF ONE SUBCONTRACT AND THE MAKING OF ANOTHER AT HIGHER COST.**—Where a prime contractor is delayed in performance of its contract because of slow work and delayed deliveries on the part of a subcontractor and is therefore instructed by competent authority to cancel its subcontract and make a new one at higher cost with a subcontractor specified by that authority, there is an implied agreement within the terms of the act of March 2, 1919, such as will entitle the prime contractor to reimbursement for such additional cost.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, based upon an implied agreement made in connection with performance of an informal written contract for manufacture of steel plugs. Claimant was directed to enter a new subcontract at a higher cost than that of the old subcontract. Held, claimant is entitled to relief under the act.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, of 1919, for \$16,637.32, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. Sometime in December, 1917, Maj. Grand, Procurement Division, Ordnance Department, as appears by his sworn statement of May 31, 1919, negotiated with the claimant for the manufacture of eyebolt type A steel lifting plugs, to be used in the lifting and handling of steel shells. The price agreed upon between the claimant and Maj. Grand included the machining of these plugs after they had been forged by the claimant. Such machining it was necessary for the claimant to have done under a subcontract, and for this work of machining it was agreed that the claimant should make to the Government a charge of actual cost only. Accordingly, the claimant procured a proposal from the National Acme Co. for the machining of these plugs at the price of 1.8 cents (\$0.018) per plug of type A, which price was approved by Maj. Grand, who, however, believed

said price to be too low. However, on this basis, he gave an order to the claimant and subsequently, on January 7, 1918, a procurement order of the purchase section, Gun Division of the Ordnance Department, was delivered to the claimant for 750,000 lifting plugs, eye-bolt type A, at a price of 9.05 cents (\$0.0905) per plug. No formal contract was ever signed between the parties, but the claimant substantially completed the filling of this order and has been paid therefor by the Government as provided in said order.

3. The above price of \$0.0905 was made up as follows:

For the forging-----	\$0.0725
Plus the exact cost price to the claimant of the machining, which was--	.018

Thus making the total price for each plug-----	0.0905
--	--------

it being understood between Maj. Grand and the claimant that the claimant was to make no profit by reason of the machining.

4. As the work progressed, it developed that the National Acme Co., whose subcontract with the claimant company for machining contained no provision covering time of delivery, was failing to make deliveries thereunder. This failure on the part of the subcontractor was claimed by it to be due to various causes, notably that the Government, from time to time, had caused changes to be made in the form and size of the plugs, but was more probably due to the fact that it found that it could not perform the machining on these plugs for such a low price as \$0.018 per plug. Other factories at this time were charging, and the Government was paying, several times this amount for the machining of plugs like these. And it appears from the sworn statement of J. H. Scobell, who was at this time Assistant Chief of the Production Division, Ordnance Department, Cleveland district, and later chairman of the Cleveland district ordnance claims board, that this price was considerably lower than any other price that could be obtained for the same type of plug in Cleveland. From the same statement it appears that the Cleveland district ordnance department, having considerable pressure brought upon it for more rapid delivery of lifting plugs, called in representatives of the claimant and advised them that it was necessary they should take steps to increase their production of plugs immediately, and that the Cleveland district ordnance office, by its chief ordnance officer, and its assistant chief ordnance officer, and by R. F. Stuart, production operator on lift plugs (who was later special assistant of the Cleveland district claims board), then instructed the claimant to take steps to cancel its contract with the National Acme Co. and develop a new source of supply for the machining work. The assistance of the Cleveland district office was given the claimant in procuring such new source of supply by bringing to claimant for negotiation the Weeks-Hoffman Co., of

Syracuse, N. Y. Approval was given by the district ordnance office to the claimant's placing the machining work with the Weeks-Hoffman Co., whose bid of 5 cents (\$0.05) per plug for such machining was the lowest bid received from any subcontractor then bidding for the work. This is shown by the well-corroborated statement of Mr. Scobell, which is, in part, as follows:

"The Cleveland office then instructed the Cleveland City Forge & Iron Company to take steps to cancel its contract with the National Acme Company and develop a new source of supply for the machining work.

The assistance of the Cleveland district office was given the Cleveland City Forge & Iron Company in procuring a new source of supply and approval was given by the District office to their placing the machining work with the Weeks-Hoffman Company, whose bid of \$0.05 per plug was the lowest received from any subcontractor then bidding for the work.

No statement of any kind was made to the Cleveland City Forge & Iron Company (the claimant) with reference to any additional compensation because of the necessity for making new arrangements for new machining, but * * * it is the judgment of the writer that the increase in price was caused by conditions beyond the control of the contractor and at the instigation of the Ordnance Department, and, unless the contractor is reimbursed for the additional expense he was forced to assume by reasons of necessity, he will not in my judgment have been fairly dealt with."

It appears from the statement of Mr. R. H. Cobb, who was chief of the cannon and ammunition section, Production Division, Cleveland district ordnance department, that his office requested the claimant to secure additional sources for machining these plugs, and such statement continues as follows:

"Local concerns approached could not or would not take over the subcontract for machining, but the Weeks-Hoffman Company, of Syracuse, represented that the quality of forgings was satisfactory to them and that their equipment was sufficient to comply with the requirements for deliveries, provided they could get forgings in sufficient quantity. This office then instructed the Cleveland City Forge & Iron Company to place the subcontract for machining with the Weeks-Hoffman Company, of Syracuse, N. Y."

Pursuant to such instructions the claimant placed a subcontract with the Weeks-Hoffman Co. which had been brought to them by the Ordnance Department. The statement of Mr. R. F. Stuart, at that time production operator on lift plugs in the Cleveland district ordnance office and later special assistant of the Cleveland district claims board, is in part as follows:

"The only information that the writer can add to this is that while production operator on lift plugs he was instrumental in having other concerns machine type A lift plugs at 4 cents each and none of these same concerns would take the product of the Cleveland

City Forge & Iron Company at that price. * * * The Weeks-Hoffman Company were acceptable to the Cleveland district ordinance office as a machining source, therefore the Cleveland City Forge & Iron Company gave the Weeks-Hoffman Company a contract at 5 cents each, and the Weeks-Hoffman Company apparently experienced no difficulty in the machining, as the rejections were under the 2 per cent allowed by the Cleveland City Forge & Iron Company."

The uncontroverted testimony of Prentice A. Stratton, taken at the hearing, shows that the Government officials, with whom the claimant was negotiating, and from whom they took instructions, insisted upon the claimants contracting with the Weeks-Hoffman Co. to do the machining on the plugs without regard to price, and that the officials had full knowledge that the price which the Weeks-Hoffman Co. would charge for machining these plugs was to be 5 or 6 cents instead of 1.8 cents (\$.018) per plug.

5. Of the plugs manufactured and delivered to the Government by the claimant 519,929 were machined for the claimant by the Weeks-Hoffman Co. under the contract entered into by the claimant with that company in pursuance of the instructions of the Government, and for each of such plugs so machined and delivered to it by the Weeks-Hoffman Co. the claimant has paid said company the sum of 5 cents (\$.05) or 3.2 cents (\$.032) more per plug than the Government has paid the claimant for such machining.

6. This claim is based by the claimant upon the theory that there exists an implied agreement on the part of the Government to reimburse the claimant for the amount that it actually paid out by reason of paying \$.032 per plug more for 519,929 plugs than was estimated to be the actual cost of machining said plugs when the original contract was given by Maj. Grand, or, as stated in another form:

Claimant paid the Weeks-Hoffman Company for the machining of 519,929 plugs, at \$.05 each-----	\$25, 996. 45
Had the National Acme Company done the machining as originally arranged for, claimant would have paid it for 519,929 plugs, at \$.018 each -----	9, 358. 73
The amount of the claim is therefore-----	16, 637. 72

DECISION.

1. The act of Congress of March 2, 1919, commonly referred to as the Dent Act, authorizes the Secretary of War to adjust, pay, or discharge all agreements, express or implied, not executed in the manner prescribed by law, upon a fair and equitable basis, that have been entered into in good faith, during the present emergency and prior to November 12, 1918, "by any officer or agent acting under his authority, direction, or instruction." The measures that were taken by the officers of the Government, as set forth in the foregoing

facts, were taken under the authority of the Secretary of War, and such officers or agents, whether military or civilian, were acting under the direction and instruction of the Secretary of War in negotiating and agreeing with the claimant, as set forth above.

2. It is the finding of this Board, from the facts brought out, that an implied agreement arose between the claimant and the United States, within the meaning of the Dent Act, which the Secretary of War is authorized to adjust, pay, or discharge upon a fair and equitable basis. Upon the faith of such agreement the claimant caused to be performed, for the benefit of the United States, services which the United States accepted and received at an actual cost to the claimant, exclusive of any prospective or possible profits, of \$16,637.72, for which amount the claimant is entitled to reimbursement by the United States.

DISPOSITION.

This Board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield, Mr. Harding, and Mr. Bryant concurring.

Case No. 1691.

In re CLAIM OF NEBRASKA & IOWA STEEL TANK CO.

1. INCORPORATION OF DOCUMENTS IN CONTRACT BY REFERENCE.—

Parties making a parol contract may by appropriate reference make documents a part of the same; and where the claimant and the Government entered into parol contract for the manufacture of oil drums and it was provided therein that the drums should be made according to the Interstate Commerce Commission Specifications No. 5 and said specifications were in writing, they were by such reference made a part of the contract.

2. UNILATERAL MISTAKE.—A mistaken belief entertained by one of the parties to a contract, as to one provision of the same, which was not shared or caused by the other party, particularly if the opposing party did not thereby obtain an unconscionable advantage, can not be made the basis of relief. And where the claimant quoted a price of \$7.95 each for making oil drums, including plugs and gaskets, and afterwards changed the offer to \$7.80 each, and thereafter the amended offer was accepted by the Government, and claimant manufactured and delivered the drums and received payment at \$7.80 each, claimant is not entitled to the difference between the two prices, upon the ground as alleged that it had a belief that the price of \$7.80 did not include plugs and gaskets.

3. CLAIM AND DECISION.—This is a class A claim on appeal from the Claims Board, Office Director of Purchase, under the act of March 2, 1919, and is based upon an informal contract which is alleged to have been made for the manufacture of galvanized oil drums. Held, that the claim as presented should be disallowed. Held further, that an error in computation in the amount of \$10.50 is shown to have been made in favor of the Government in settling with the claimant and that claimant should be reimbursed in that amount.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This is an appeal on a class A claim from the Claims Board, Office of the Director of Purchase. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, revised, of 1919, for \$1,060, by reason of an agreement alleged to have been entered into between the claimant and the United States. A hearing was held January 5, 1920.

2. On August 22, 1918, Capt. J. G. Williams, of the Quartermaster Corps, assigned to the Hardware and Metals Division, requested from claimant—

“A quotation on steel drums to be manufactured in strict accordance with Interstate Commerce Commission regulations as described in ‘Shipping Containers Specifications No. 5,’ dated October 1, 1914.”

Section 11 of said specifications is, in part, as follows:

"Provision must be made for closing the bungholes and other openings in such a manner as to prevent leakage."

The meaning of this language, as shown by the testimony at the hearing, is that the complete steel drum called for by the specifications included plugs and gaskets to stop the bungholes.

3. The claimant replied to the foregoing request under date of August 31, 1918, that he could furnish 4,500 55-gallon galvanized oil drums which would comply with the regulations described in said specifications, at a price of \$7.95 each, and claimant was allotted 7,000 barrels. On September 3, 1918, claimant wrote Capt. Williams, referring to its letter of August 31, and saying:

"We wish to advise that our terms are 1%-10 days, 30 days, net."

On September 5, 1918, F. J. Storm, the agent of the claimant in Washington, wired claimant that Capt. Williams had changed the allotment to 4,500 drums, September delivery, instead of 7,000, and added "You are to furnish plugs and gaskets."

4. On September 7, 1918, claimant wrote Capt. Williams as follows:

"We were wired by Mr. F. J. Storm that you allotted us, 4,500 55-gallon I. C. C. barrels to manufacture, *we to furnish plugs and gaskets*, but we have not received formal order from you, but suppose this is on the way to us now."

The claimant subsequently received a formal contract, number HC-598-0, from the contract and purchase branch, General Supply Division, covering 7,000 steel galvanized barrels of the specifications mentioned above, at a price of \$7.95 each, delivery to be complete by October 1, 1918. On September 24, 1918, the claimant telegraphed Capt. Williams that he revised his bid of August 31 from \$7.95 per steel drum to \$7.80 per steel drum.

5. The president of the claimant on the witness stand (Tr. pp. 21 et seq.) admitted that this reduction in price was not induced by any suggestion of the Government but was made voluntarily by him after he had had a conference with Mr. William T. Knapp, of the Butler Manufacturing Co. of Kansas City. The Butler Co. was also manufacturing steel drums. Mr. Knapp told claimant that there had been quite a little talk about the high price of barrels and that barrel manufacturers should go over their prices again and see if they could not lower them; that the Budd Manufacturing Co. had agreed to put in machinery to manufacture and furnish barrels at a much less price, providing they could get the contract for the whole quantity, and Mr. Knapp thought it would be advisable that those in the barrel business should lower their prices. He proceeded "and it was on that talk I had on the telephone that I put my price down, as I

was, of course, interested that no more people should get into the manufacture of steel barrels at this time. There were a great many in it anyway, and I cut the price 15 cents." On September 25, 1918, the claimant wrote Capt. Williams as follows:

"We understand, through our Mr. F. J. Storm, that the price we quoted on the galvanized drums was too high. We put this, we thought, within a reasonable reach of price and confined ourselves to a small percentage on the cost. The price we quoted, as you no doubt know, is \$7.95 each, and we wired you we would revise this price for \$7.80 each, and we now wish to confirm this telegram and we hope you will find this entirely satisfactory as we wish at all times to be fair on these things."

6. On September 28, 1918, by which time the claimant had received from the Government the formal contract above mentioned, the claimant wrote acknowledging its receipt, and in his letter stated that it was his understanding that the contract was for 4,500 barrels, not 7,000 barrels; that he was willing to supply 7,000 barrels if he could obtain the material for the additional 2,500 barrels; that it was impossible to fill the contract by October 1, but he would do the best he could. He also stated:

"You have no doubt received our letter of September 25, 1918, in which we revised our price on these barrels from \$7.95 to \$7.80, and you will no doubt want to incorporate this in the contract."

The formal contract was never signed by either party, but the claimant manufactured and delivered to the United States the entire 7,000 oil drums, complete, in accordance with the specifications. He billed these barrels to the Government at \$7.95 each, and has been paid therefor the sum of \$7.80 each. This claim is filed to cover the difference, which amounts to \$1,050.

7. At the time of such payment the Government deducted in accordance with the terms of the claimant, as stated in his letter to Capt. Williams of September 3, 1 per cent discount, basing its deduction on the payment of \$7.95 per barrel instead of \$7.80, thereby deducting from its bill an amount of \$10.50 in excess of the amount which should have been deducted.

8. The theory upon which the claimant bases his claim is that his original quotation of \$7.95 was for the barrels without the plugs and gaskets; that his revised bid was based upon the original quotation and was not intended to include plugs and gaskets, but this theory is not borne out by the evidence in the case.

DECISION.

In the opinion of the Board neither the letter of August 22, with its reply of August 31, nor the telegram of September 5, followed by the letter of September 7, 1918, resulted in a meeting of the minds

of the parties, because it is clear from the telegram of the claimant of September 24, and its letter of September 25, that the minds of the parties had not up to that time reached a meeting point. At that time the claimant offered to deliver 4,500 barrels, complete with plugs and gaskets, on October 1, 1918, and 2,500 barrels as soon as practicable thereafter, all at the price of \$7.80 per barrel. The Government seems to have made no verbal or written acceptance of this offer, but it accepted and paid for the barrels in accordance with this offer, thus completing the only agreement between the parties.

2. It is shown by the findings that the Government deducted too great a discount to the amount of \$10.50.

3. In accordance with the foregoing decision the prayer of the claimant is denied, except as to his reimbursement of \$10.50.

DISPOSITION.

This Board will prepare a document setting forth the nature, terms, and conditions of the agreement, together with certificate, Form C, and will accomplish the payment to the claimant of an award in the amount of \$10.50 to reimburse claimant for overpayment of discount by him.

Col. Delafield and Mr. Harding concurring.

Case No. 1989.

In re CLAIM OF HAWAIIAN CANNERIES CO. (LTD.).

1. **PRICE FIXED IN ACCORDANCE WITH AGREEMENT.**—Where an authorized agent of the Government notified claimant that the Government would require $12\frac{1}{2}$ per cent of its pineapple pack for the season of 1918, and invoices should be made and payment made on the basis of 75 per cent, and it was agreed that the balance of the payment should be made according to a definite price to be fixed by the Government contracting officer on the basis of cost plus a reasonable profit as ascertained by the Federal Trade Commission, and the price was fixed by the contracting officer in accordance with agreement, the claimant will be required to accept settlement on that basis.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$16,246.64 for pineapples furnished pursuant to purchase orders termed "allotments." Held, claimant is entitled to price fixed by contracting officer which was in accordance with contract, and not to the price claimed.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$14,212.35 (amended at the hearing to \$16,246.64) by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On June 11, 1918, the office of the depot quartermaster, Fort Mason, San Francisco, Calif., issued to claimant, Hawaiian Canneries Co. (Ltd.), provisional invoices of purchase orders termed "allotments," Nos. 6616 and 6617; on June 14, 1918, the same office issued similar order, No. 6677, and on October 14, 1918, the same office issued another order, No. 1627. These purchase orders were issued in form of an allotment because the executive committee of the United States Food Purchase Board had passed a resolution on April 30, 1918, recommending that the 1918 pineapple pack be handled on

the allotment plan. The first three orders above referred to contain the following wording:

"Under allotment please deliver the following articles, accompanied by bills in quadruplicate describing the articles with the same wording as on this order. . . ."

"NOTE.—Payment to be made on the basis of 75 per cent of the prices shown pending settlement of definite prices."

The size, grade, and aggregate quantities of pineapples required stated in unit per cans, and the stipulated price per unit can in these orders are as follows:

Order No.	Quantity of pineapples.	Article.	Unit price per can.
			<i>Cents.</i>
6616.....	6,000	No. 2 standard sliced.....	13½
6617.....	28,701	No. 2 extra sliced.....	14½
	15,696	No. 2 standard sliced.....	13½
6677.....	15,312	No. 2 broken slices.....	14½
	1,992	No. 2½ standard sliced.....	15
	28,320	No. 2½ extra sliced.....	17½
1627.....	57,168	do.....	14½
	38,112	No. 2½ standard sliced.....	12½

The first two allotments provided that the cost of strapping should be included in the unit price; order No. 6677 provides that the cost of strapping is to be added to the unit price, and order No. 1627 makes no reference to strapping.

3. The quantities specified in the above-mentioned orders were shipped to various points of delivery specified therein, and invoices were rendered on the basis of 75 per cent of the price stipulated in the orders. Payment thereon, including extra charges for strapping, etc., aggregating \$24,692.62, has been made for 75 per cent of the unit price stated in the orders, leaving the balance of the price claimed open for future adjustment.

4. In its petition the claimant sets forth the terms and conditions of the agreement upon which it relies, as follows:

"The agreements are substantiated by order Nos. 6616, 6617, 6677, and 1627, certified copies of which are in the hands of the Board of Contract Adjustment. In accordance with the operations of the United States Food Administration, according to allotments as scheduled, it was agreed that the provisional price as set forth should be paid when invoices were presented and an adjustment made at a later period, based upon a reasonable profit to ourselves, such reasonable profit, we ask, shall be in this instance 12½ per cent on the standard grade and 15 per cent on the extra grade. The statement of the costs in connection with the examination of the representative of the Federal Trade Commission appears in an attached document, the basis upon which we presented our request for adjustment being that of valuing fruit at market price per pound, finished fruit, using market differential."

5. The pineapples which the claimant furnished the War Department on the above-mentioned orders were furnished on the terms and conditions set forth in Bulletin No. 13, November 9, 1918, issued by the United States Food Administration, Division of Coordination of Purchase; and it was agreed that the settlement of definite prices should be made by the Government contracting officer according to the costs ascertained by the Federal Trade Commission, plus a reasonable profit over cost. (Record, pp. 14, 15.)

The United States Food Administration's Bulletin No. 13 contains recommendations to the Food Purchase Board, as follows:

"1. After costs have been ascertained by the Federal Trade Commission, 'fair and just' zone prices shall be determined on the principle that such prices represent cost plus a fair margin of profit, *but not above the market*, and an interpretation of the manner in which the market prices shall be determined is hereinafter set forth.

"2. The Army, Navy, and Marine Corps, hereinafter referred to as the purchasers, shall offer to the packer, hereinafter referred to as the seller, the zone price determined upon as applying to the zone in which the seller is located.

* * * * *

"5. If a seller is not satisfied with the established zone price, he may file a protest in writing with the purchaser, and his cost shall be determined by the Federal Trade Commission. To these costs shall be added a fair profit, which total amount shall not exceed the seller's justified average selling price, to be ascertained as hereinafter stated, on that portion of his pack not allotted to the purchasers.

* * * * *

"7. The Food Purchase Board shall recommend a fair and just profit be paid. * * *."

6. In order to assist the Food Purchase Board in determining the fair and just price for Hawaiian pineapples of the 1918 pack, seven of the eight Hawaiian pineapple packers, acting as a subcommittee of the California Preserved Food Committee, held a meeting on February 19 and unanimously agreed at a price they were willing to accept. The claimant company, however, was not present at this meeting, and did not accept the prices agreed upon. As a result of this meeting, the following letter was sent to the Food Purchase Board:

HEADQUARTERS CALIFORNIA PRESERVED FOOD,
GENERAL COMMITTEE,
February 26, 1919.

FOOD PURCHASE BOARD,
Washington, D. C.

GENTLEMEN: At the meeting of the pineapple packers, acting as a subcommittee of the California Preserved Food Committee, held Feb. 19, 1919, it was resolved that the average net selling price for pine-

apple, after deducting freight—as submitted by Mr. Frank J. Scott—and for convenience repeated below, be taken as a basis of final settlement for all pineapple delivered to the Government, for which final settlement has not as yet been made, such deliveries being from the 1918 pack:

No. 2½ extra sliced.....	\$4. 36 per case.
No. 2T " "	3. 58 " "
No. 10 " "	3. 07 " "
No. 2½ standard sliced.....	3. 92 " "
No. 2T " "	3. 23 " "
No. 10 " "	2. 84 " "
No. 2½ standard broken slices.....	3. 65 " "
No. 2T " " "	3. 17 " "
No. 10 " " "	2. 76 " "
No. 2½ extra crushed & grated.....	4. 37 " "
No. 2T " " "	3. 63 " "
No. 2T standard crushed & grated.....	3. 21 " "
No. 2½ extra broken slices.....	3. 73 " "

That from this net average selling price the Government be allowed a flat discount of 10 per cent, such net figure to be the basis of payment for the pineapple f. o. b. point of shipment—Hawaiian Islands.

It is the sense of this committee that this basis is fair and equitable to the industry as a whole, and it is also the recommendation of the committee that it be accepted.

The packers represented and voting in favor were as follows:

Haiku Fruit & Packing Co., represented by Griffith-Durney Co.
Hawaiian Pineapple Co.

Hawaii Preserving Co., represented by California Packing Corp.

Honolua Ranch, represented by Griffith-Durney Co.

Kauai Fruit & Land Co., represented by Alexander & Baldwin, Ltd.

Libby, McNeill & Libby.

Pearl City Fruit Co., represented by Theo. H. Davies & Co.

Yours, very truly,

CALIFORNIA PRESERVED FOOD COMMITTEE,
By H. E. MACCONAUGHEY, *Secretary*.

7. The function of the Federal Trade Commission was to ascertain cost data to be used by the Food Purchase Board in arriving at fair and just prices. The function of the Food Purchase Board was to examine the cost data supplied by the Federal Trade Commission, to secure all the information possible regarding the conditions of an industry, and to confer with members of the industry in an effort to arrive at fair and just prices that were in turn recommended as such to the Secretary of War and Secretary of the Navy. The final fixing of prices always rested with the purchaser. (Record, p. 82.)

In fulfillment of its functions the Federal Trade Commission made complete cost data reports to the Food Purchase Board concerning the Hawaiian pineapple canners. With this data before it, the Food Purchase Board on April 15, 1918, finally established the prices for the 1918 pineapple pack at exactly the same prices recommended by the California Preserved Food Committee, less 10 per cent discount to the Government allowed by that committee. (Record, pp. 57, 58,

84.) On April 15, 1918, the Food Purchase Board made its recommendation of prices for 1918-pack pineapples to the War Department, which approved the price, and the following letter was sent to the Zone Supply Officer, San Francisco, Calif.:

WASHINGTON, April 17, 1918.

No.: 432.5 Sub-Pur.

From: Director of Purchase (Subsistence Division).

To: Zone Supply Officer, San Francisco, California.

Subject: Canned pineapple.

1. This division has received, under date of April 15, 1918, from the Food Purchase Board, the following letter:

"Subject: Firm prices for the 1918 pack of pineapples.

"Based upon cost data ascertained by the Federal Trade Commission, the Food Purchase Board on April 15, 1918, recommended the following prices for tinned pineapple from the 1918 pack f. o. b. Hawaii, which are in accordance with letter of the California Preserved Food Committee dated February 26, 1918, to the Food Purchase Board, and are not subject to protest:

Grade.	Size.	Cans per case.	Firm price per case f. o. b. Hawaii.
Extra sliced.....	2½	24	\$3.9240
Do.....	2T	24	3.2220
Do.....	10	6	2.763
Standard sliced.....	2½	24	3.528
Do.....	2T	24	2.907
Do.....	10	6	2.5533
Standard broken slices.....	2½	24	3.2832
Do.....	2T	24	2.853
Do.....	10	6	2.4813
Extra grated.....	2½	24	3.933
Do.....	2T	24	3.2625
Standard grated.....	2T	24	2.889
Extra whole cored.....	2½	24	3.987
Extra broken slices.....	2½	24	3.357

"The above prices include the cost of boxes and the following strapping charges are allowed in addition:

¾-inch flat iron strapping..... 8¢ per case.
Gerrard, Signode, or equivalent wire strapping..... 5¢ per case."

By authority of the Director of Purchase and Storage:

J. H. ADAMS,

*Lieutenant Colonel, Quartermaster Corps,
In Charge Subsistence Division.*

By GEO. J. LACE,

*1st Lieutenant, Quartermaster Corps,
In Charge Purchasing Branch.*

8. Under date of May 5 and May 9, 1919, claimant received from the zone supply officer, San Francisco, Calif., vouchers covering the balance due claimant on allotments numbered 6616, 6617, 6677, and

1627. The prices to be paid by these vouchers accord with prices set forth in the letter of the Director of Purchase, Subsistence Division, of April 17 (above quoted), a copy of which accompanied the vouchers.

On June 17, 1919, the claimant returned the vouchers to the zone supply officer, San Francisco, Calif., and declined to accept them as payment of the balance due for the pineapples. On the same day the claimant wrote protesting the zone price and requesting that an adjustment be made and a final price fixed upon the basis of the investigation of costs, plus a reasonable profit, as made by the Federal Trade Commission.

9. By letter of June 28, 1919, claimant presented its claim to the Subsistence Division, Quartermaster General's Department, Washington. On July 14, 1919, that office "By authority of the Director of Purchase" acknowledged receipt of claimant's letter and stated:

"The price fixed is 10% off the opening price of 1918 pineapple, less the freight differential between Hawaii and San Francisco, as delivery was accepted f. o. b. Hawaii. This price was suggested and agreed to by all canners concerned except your company. In view of the almost unanimous agreement it is considered that the price established fixes the market price to the Government for this commodity and no other price can be allowed."

On July 15 the claimant wrote the Director of Purchase, Washington, acknowledging receipt of his letter of July 14 and requesting that its protest be recognized, and that "a proper adjustment be made based upon the figures provided by the representative of the Federal Trade Commission, under which proposition we (it) accepted allotments and delivered the goods upon various Government requisitions."

On July 23 the vouchers were again sent claimant, but the claimant again returned them, declining to accept them in full payment of the invoices.

On July 31 claimant was sent a telegram from the Subsistence Division as follows:

"Food Purchase Board determines that no price other than that fixed in list of April seventeenth, nineteen nineteen, can be allowed on Hawaiian pineapple nineteen eighteen pack."

On July 31 claimant again appealed to the Director of Purchase and received the following reply, dated August 6:

"After due consideration, this office is unwilling to depart from the position stated in telegram of July 31st referred to in your letter."

10. On August 15 claimant submitted its claim to the Claims Board, Office of the Director of Purchase. That Board forwarded the claim to the Board of Contract Adjustment under the provisions of Supply Circular No. 17, 1919.

11. By its petition the claimant requested this Board to fix prices for pineapples it furnished the Government in excess of the prices fixed by the War Department, on the recommendation of the Food Purchase Board, and twice tendered to claimant. It also made claim for the following allowances:

(a) Allowance of interest from the date of acceptance of the pineapples to November 20, 1919, which items were amended at the hearing so as to make claim for excess service and carrying charges (instead of interest) from date of acceptance of the pineapples to February 1, 1920.

(b) Allowance of a claim for pineapples furnished the Navy Department, and interest; also

(c) To have this Board fix a reasonable price for pineapples furnished the British Government on an allotment, so that it may present the same to the British Navy and Army Canteen Board for payment.

12. At the hearing the claimant company was represented by the principal stockholder and owner, Mr. Samuel F. Haserot, who had practically all of the previous dealings with the Government herein set forth. On behalf of the claimant Mr. Haserot withdrew from consideration by the Board of Contract Adjustment its claim for pineapples furnished the Navy Department and interest thereon. (Record, p. 11.) He also stated that he did not desire that this Board fix a price for pineapples furnished the British Government, but merely desired to have a copy of the decision of this Board on the claim in so far as it relates to pineapples furnished the War Department of the United States. (Record, p. 118.)

12. There was admitted in evidence a copy of the original report of the Federal Trade Commission to the Food Purchase Board, dated March 15, 1918, and the supplemental report dated March 27, 1918, which contained the cost data of the seven principal Hawaiian pineapple canneries, prepared by the Federal Trade Commission. There was also submitted in evidence a tabulated statement prepared by the Federal Trade Commission of the cost data of the claimant company alone, which was used to make comparison of claimant's costs in reference to the average cost of all Hawaiian canneries. It was shown that the figures contained in these reports were compiled by the Federal Trade Commission and given to the Food Purchase Board as the necessary data to guide it in making its recommendation to the War and Navy Departments for the fixing of reasonable prices for Hawaiian pineapples of the 1918 pack.

13. These reports were presented by the Federal Trade Commission to the Food Purchase Board and considered by it as the basis for recommending to the War Department the prices to be paid for the 1918 pack of pineapples which were bought on the allotment plan. (Record, pp. 57, 58, 80.) In fact, these reports contain the figures of cost, as determined by the Federal Trade Commission, which the

claimant agreed, and has always contended, should be made the basis on which his costs should be determined. At the hearing Mr. Haserot stated the claimant was now willing to have its costs fixed by this Board on the basis of the data contained in the final reports of the Federal Trade Commission. (Record, p. 35.) Later, however (Record, p. 71, 89), he conceded that the method adopted by the Federal Trade Commission was correct in all respects except as to the original cost of the raw fruit.

14. The cost data and the reports of the Federal Trade Commission above referred to were carefully scrutinized at the hearing, and Mr. Frank J. Scott, a former member of the Federal Trade Commission and who represented that Commission on the Food Purchase Board, also Lieut. Commander Emory D. Stanley, United States Navy, who represented the Paymaster General of the Navy on the Food Purchase Board, each gave testimony explanatory of the reports and of the actions of the Commission and Board of which they were members.

15. In the supplemental report of the Federal Trade Commission, dated March 27, 1918, and in the report concerning the claimant's costs alone, there are four tables of computing costs which were compiled for the purpose of guiding the Food Purchase Board in determining a fair marginal price to be used. Each of these tables contains a different method of calculating cost per case, which are, respectively, as follows:

"A. Valuing fruit at actual average cost per finished pound.

"B. Valuing fruit at average market price per finished pound.

"C. Valuing fruit at actual cost per finished pound, using the market differential.

"D. Valuing fruit at market price per finished pound, using the market differential."

In its petition the claimant requested that an adjustment of price be made by fixing the value of fruit at the market price per pound finished fruit, using the market differential.

The Government witnesses testified that the only fair way of computing the claimant's costs is by the method of computing the actual average cost. (Record, pp. 62, 82.) They also testified that the Food Purchase Board adopted, as the only proper method of calculating cost, the valuation of the product at its actual cost (Table A, above), and that the other methods of computing cost (Tables B, C, and D, above) were merely estimates based upon a hypothetical theory which may or may not be true. Tables showing other methods of computing costs were compiled for the purpose of guiding the Food Purchase Board in determining a fair marginal price, but these other methods of calculation could not be relied on. (Record, pp. 60, 82.)

Mr. Scott also testified that method D above of calculating costs, viz, valuing fruit at market price per finished pound, using the market differential, was based upon the assumption that all fruit was purchased by the company and such method of computing costs was valueless when the company produced some of the fruit itself and purchased the balance. (Record, pp. 62, 81.) Referring to Table 4 of the supplemental report of the Federal Trade Commission, it was shown that the claimant company purchased 9.2 per cent of its raw product at an average of \$15.56 per ton, and that it grew 90.8 per cent of its raw product at an average of \$16.31. On the other hand, this table shows that the average cost per ton to the seven canneries who accepted the rates fixed by the Government is \$21.31 per ton, or \$5 a ton in excess of claimant's costs.

16. There was testimony in explanation of the tables prepared by the Federal Trade Commission, showing the claimant's total cost per case, valuing the fruit at the actual average cost per finished pound, which showed that a charge of interest and office expenses in the United States (estimated at 2½ per cent of claimant's published list price) should be added, in order to ascertain the complete actual cost. These figures appear in the first column below. These figures when compared with prices fixed by the Government show the profit the claimant would have derived by accepting the Government prices. In tabulated form the result of the testimony is as follows:

Grade and size of sliced pineapples.	Claimant's total actual cost per case f. o. b. Hawaii.	Price fixed by Government.	Profit to claimant per case by accepting Government price.	Per cent profit.
No. 2½ extra.....	\$3. 53907	\$3. 9240	\$0. 38493	10. 8
No. 2T extra.....	2. 69907	3. 2220	. 52293	19. 3
No. 2½ standard.....	3. 22167	3. 5280	. 30633	9. 5
No. 2T standard.....	2. 47425	2. 9070	. 43275	17. 6
No. 2½ broken standard.....	3. 03117	3. 2832	. 25203	17. 4

In other words, the Government witnesses testified that for the various grades and sizes of pineapple which the claimant furnished the Government it would receive a profit per case, over the total actual cost, from 30 to 52 cents, by accepting the price fixed by the Government; that is, it would receive a profit ranging from 9.5 per cent to 19.3 per cent for its pineapples by accepting the Government prices.

17. The testimony further developed the fact that the claimant company annually fixed what was termed "opening prices," at which it would sell to the trade f. o. b. San Francisco. These prices, although subject to change, were fixed in May and the prices so fixed for the 1918 pack are noted in the first column of the tabu-

lation appearing at the end of this paragraph. Mr. Haserot testified that the orders from the Government took about $12\frac{1}{2}$ per cent of claimant's 1918 pack, and claimant would have been willing to have sold that amount to the trade at the opening prices. (Record, pp. 97, 98.) Mr. Scott testified that, in order to ascertain the difference in cost f. o. b. San Francisco and the difference in cost f. o. b. Hawaii, there should be deducted the freight from Honolulu to San Francisco, the brokerage commission to be allowed if the goods were sold to the civilian trade, and the usual discount allowed for cash, thereby determining the net value of the fruit f. o. b. Hawaii, based upon claimant's list prices. By comparison of this result with the Government list prices it was shown that the prices fixed by the Government for pineapples f. o. b. Hawaii were greater in each instance than the value of the fruit f. o. b. Hawaii, according to the list prices voluntarily established by the claimant. In other words, by accepting the Government prices the claimant would gain from 0.009 to 0.078 cents per case more than it would have gained had it sold to the trade, according to the opening list prices it had voluntarily established for the 1918 pack. The following tabulated statement, taken from the figures contained in the report of the Federal Trade Commission, shows the conclusions arrived at by the witness:

Grade of sliced pineapples.	List price f. o. b. San Francisco, established by claimant.	Deduct.			Net value of fruit f. o. b. Hawaii, based on claimant's list price.	Prices fixed by Government.	Excess on prices offered by Government over what claimant would have made had it sold to trade.
		Commis- sion.	Cash discount.	Freight, Honolu- lu to San Francisco, per case.			
No. 24 extra.....	\$4.50	\$0.225	\$0.09	\$.27	\$2.915	\$3.924	\$0.009
No. 2T extra.....	3.60	.18	.072	.20	3.148	3.222	.074
No. 24 standard.....	4.00	.20	.08	.27	3.45	3.528	.078
No. 2T standard.....	3.30	.165	.066	.20	2.869	2.907	.038
No. 24 T standard, broken.....	3.70	.135	.074	.27	3.221	2.2832	.0622

18. The claimant admitted that the price of pineapples tendered claimant by the Government would have covered the cost of the pineapples for that particular year, plus a reasonable profit, but contended that this price would not have made proper allowance for the deficit of previous years. (Record, p. 95.) This deficit had been caused by the loss sustained in bringing the claimant's pineapple plantations up to a state of adequate production. (Record, pp. 94, 102.) This loss was carried on claimant's books as a deficit of \$34,620.51 for the year ending December 31, 1917, and \$24,298.44 for the year ending December 31, 1918. (Record, pp. 77, 78.)

It was shown that the claimant's cost for its raw product, as shown by the report of the Federal Trade Commission, was \$5 a ton less than the average cost per ton to the seven principal Hawaiian canners, who accepted the prices fixed by the Government. Claimant used in its business approximately 1,100 tons of raw fruit per year. In other words, claimant, by accepting the Government prices, would receive \$5 per ton, or \$5,500 in excess of what the other canners would receive, basing the price fixed on the cost of the raw product.

When asked how long claimant expected to take to wipe out the company's deficit, Mr. Haserot answered that he figured on the results in 1918; that \$3,000 a year could be written off to be applied to the deficit after paying for depreciation and 6 per cent on the capital invested, so that the whole deficit would be wiped out in little over 10 years. (Record, pp. 106, 107.) It would thus appear that if the claimant wanted to write off \$3,000 of its deficit each year, and the rates fixed by the Government allowed the claimant \$5 a ton for 1,100 tons of raw product over what the raw product actually cost it, then claimant would have \$5,500 to apply against its deficit for the year, or \$2,500 each year in excess of what it deemed adequate to apply against the deficit of previous years. (Record, pp. 108-114.)

DECISION.

1. The orders under which the claimant furnished the War Department pineapples provided that it should receive payment of 75 per cent of the provisional price stated in the orders pending settlement of definite prices. Claimant has received payment of the 75 per cent of the provisional prices and now seeks to have this board fix the prices which it is entitled to be paid in final settlement for the pineapples.

When the claimant supplied the War Department with the pineapples, it was understood and agreed that the settlement of definite prices should be made by the Government contracting officer on the basis of costs, plus a reasonable profit as ascertained by the Federal Trade Commission. It was also part of the agreement that just and fair prices should be recommended by the Food Purchase Board, which recommendation should be based on the cost data prepared by the Federal Trade Commission. The prices were fixed by the Government contracting officer in accordance with the agreement, and a settlement was twice tendered claimant but refused by it because of the contention that the costs as ascertained by the Federal Trade Commission and the prices recommended by the Food Purchase Board and fixed by the War Department based on such costs do not allow the claimant a reasonable profit over cost, which it now claims should be of from 12½ per cent to 15 per cent.

2. It appears that seven of the principal Hawaiian pineapple packers entered into a voluntary agreement of prices at which they would sell their 1918 pack to the Government and so notified the Food Purchase Board. Though the claimant was not a party to this agreement, the effect of it was to establish a market price for Hawaiian pineapples. Bulletin No. 13 of the United States Food Administration, which the claimant admits contains the essence of its agreement with the Government, provides that the price to be allowed for food purchased on the allotment plan shall not be above the market price.

The Federal Trade Commission, after an examination of claimant's and other Hawaiian canners' plants and books, compiled extensive and valuable cost data reports of the various canners. These reports were submitted to the Food Purchase Board, which fully considered them and recommended to the War Department that the same prices be paid for pineapples as had previously been agreed to be reasonable and fair by the seven principal packers.

All of this should be a strong reason for believing the prices to be fair, and such prices should not be set aside without cogent reasons.

3. We have carefully scrutinized the cost data contained in the reports of the Federal Trade Commission, both as to the average costs of the seven principal Hawaiian canners and as to the claimant's costs alone. The uncontroverted testimony in the record shows that the only just and fair method of determining costs of pineapples per case is the method of valuing the fruit at the actual average cost per finished pound, which is contained in a table in said reports. The method of computing costs which the claimant desired applied in reckoning its costs, viz, valuing the fruit at the market price per finished pound, using the market differential, was shown at the hearing to be merely a hypothetical method of computing costs which could not be relied on. It was further shown that this latter method was based upon the theory that the canner purchased the entire amount of the raw product, whereas, in fact, the claimant purchased only 9.2 per cent of its raw product. It was, therefore, conclusively shown that this method of computing the claimant's costs is valueless and must be discarded. We, therefore, conclude that the proper method of computing the claimant's costs, as shown by the report of the Federal Trade Commission, is the method of valuing the fruit at the actual average cost per finished pound, which is the method adopted by the Food Purchase Board as being the only correct method of computing costs..

4. It has been shown that the claimant furnished the Government about 12½ per cent of its 1918 pack of pineapples. This quantity, the claimant concedes, it would have furnished to the trade at the

prices stated in its "opening list prices" f. o. b. San Francisco. By taking these opening list prices f. o. b. San Francisco, and making proper deductions therefrom for freight from Honolulu, etc., we ascertain the valuation which claimant itself put on its pineapples f. o. b. Hawaii, based upon its opening list prices. In each instance and for every grade and size of pineapples, the valuation which claimant put on its fruit at Honolulu, based upon its opening list prices, is less than the prices which the Government fixed and offered the claimant for its pineapples f. o. b. Hawaii. We find that, by accepting the Government prices, the claimant would gain from \$0.009 to \$0.078 per case over what it would have gained had it sold the trade at the opening list prices which claimant voluntarily established. We fail to find any ground of complaint, because the Government was willing and offered to pay more than the claimant offered to sell to the general trade.

5. By computing the claimant's total actual costs of fruit per case f. o. b. Hawaii, and by comparing these figures with the prices offered by the Government, we find that the Government prices are in excess of claimant's costs in amounts varying from 30 to 52 cents per case. In other words, by accepting the Government prices, the claimant would receive on the various grades and sizes of pineapples the following per cent profits, viz, 9.5 per cent, 10.8 per cent, 17.4 per cent, 17.8 per cent, and 19.3 per cent. We do not find that the prices fixed by the Government, which allow such profits are unfair.

6. At the hearing the claimant contended that the figures of the original cost of the raw product, as ascertained by the Federal Trade Commission, did not show the true cost of the raw product because they included only the cost of production for the single year, whereas the claimant's pineapple plantations were run at a loss in previous years while the plantations were brought up to a state of adequate production. The claimant contended that \$3,000 of the previous deficit should be apportioned annually to the actual cost of production, so that the deficit might be wiped out in 10 years. In other words, the claimant contended that it should be allowed \$3,000 a year over the actual cost of the raw product to set off against its previous deficit.

It was shown that claimant used 1,100 tons of raw product per year, and that the average cost of such raw product to claimant was \$16.31. It was further shown that the average cost to the seven principal Hawaiian canners for raw product was \$21.31, and it was on the basis of these costs that the Food Purchase Board recommended and the Government fixed the prices.

Thus, we find that the Food Purchase Board recommended, and the Government fixed, prices based upon a cost of the raw product \$5 a ton in excess of what claimant was paying for its raw product.

Thus, the claimant netted on the prices fixed by the Government, a bookkeeping profit of \$5 a ton on 1,100 tons, or \$5,500 per year, on the actual cost of its raw product. In other words, the prices which were deemed by the trade and by the Government to be fair and reasonable were fixed on the assumption that the raw fruit cost \$21.31 per ton, whereas, in fact, it cost claimant \$5 a ton less for 1,100 tons used by it.

It follows from the foregoing that the prices fixed by the Government would allow it to set off against its previous deficit the sum of \$5,500 annually or \$2,500 in excess of what claimant contends it should be allowed. It is apparent that even though we go behind the cost data ascertained by the Federal Trade Commission (which data the claimant agreed should be made the basis for fixing prices), we find that the claimant has not been injured, but has actually derived a benefit from the prices fixed \$2,500 per year greater than was expected.

7. At the hearing a further contention was made on behalf of the claimant. Mr. Haserot stated that if the claimant had supplied the Government only the smaller sized pineapples, it would not have presented a claim, because it would have had none. He stated, however, that the conditions governing the production of claimant's percentage of the larger sized canned pineapples increased their cost of production and made a loss to claimant in producing canned pineapples of the larger size. (Record, p. 69.) In other words, a producer would not get from any given lot of pineapples a sufficient number of pineapples of the larger diameter which were required for the larger sized cans.

It was shown, however, that the prices allowed by the Government, based on the data ascertained by the Federal Trade Commission, permitted the claimant to make a profit, on the cost of production of the No. 2½ extra sliced pineapples of 10.8 per cent and 9.5 per cent on the No. 2½ extra standard grade. It was also shown that although the cost of production of the larger sized grades was greater than the smaller size, what went into the cans of the grade of broken sliced pineapples was in the nature of a by-product, from which the claimant derived a percentage profit of over 17 per cent. Thus, the smaller profit on the larger pineapples was amply offset by a greater profit on the other grades.

Mr. Scott testified that it cost \$1.17 more per case to produce the No. 2½ grade pineapples than for the No. 2 grade, despite which there was only a difference in claimant's selling price to the trade of 90 cents. Mr. Haserot admitted that competitive conditions prevented the claimant from charging the trade according to the cost of production so as to cover losses.

We therefore see no reason why the Government should pay what the claimant was unable to obtain, in the usual course of business, from the trade in competition with other producers.

8. Viewing the claim from the various angles presented, we are unalterably drawn to the conclusion that the prices fixed by the Government and offered to the claimant for the pineapples it furnished under orders numbered 6616, 6617, 6677, and 1627 are fair and reasonable to the claimant.

These prices were fixed by the Government on the recommendation of the Food Purchase Board, which recommendation was based upon the cost data ascertained by the Federal Trade Commission. This method of fixing the prices was in strict accordance with the agreement which claimant had with the Government when it furnished the pineapples in question. No valid reason is shown for upsetting that agreement or for setting aside the prices fixed in the manner agreed upon.

9. The purchase orders provide for the manner of payment, and do not call for an excess payment either as interest (as stated in the original claim) or as carrying charges and extra services (as stated in the amended claim). The Government twice offered the claimant vouchers covering the full amount due it, and can not be held liable for the claimant's refusal to accept payment, and thus charge to the Government the loss ensuing from such refusal. As the orders under which the fruit was purchased make no provision for extra allowance, whether it be stated as interest or as carrying charges and extra services, the result is the same. The Board therefore declines to make allowance therefor.

10. For the reasons stated, this Board is of the opinion that the claimant is entitled to be paid the balance due on the said purchase orders on the basis of the prices fixed by the Government and already tendered to the claimant.

DISPOSITION.

1. This Board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Smith concurring.

Case No. 2336.

In re **CLAIM OF HEWES & POTTER.**

1. **CHANGE IN SPECIFICATIONS—REIMBURSEMENT.**—Where the Government agreed to supply material of certain dimensions at a fixed price, to a manufacturer furnishing articles to it under a unit priced contract, and instead of furnishing material of the dimensions specified, furnished material of a different dimension, which resulted in wastage of material and consequent loss to the manufacturer, there is an implied agreement whereby the Government is obligated to pay for the loss.
2. **CLAIM AND DECISION.**—Claim is made on proxy-signed contract under the act of March 2, 1919, for loss resulting from the Government supplying 22-inch duck instead of 25-inch duck. Held, claimant is entitled to reimbursement for such loss. However, if any saving resulted from later instructions to claimant, such saving should be considered.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B. has been filed under Purchase. Storage and Traffic Division Supply Circular No. 17, 1919, for \$2,660.22, by reason of an agreement alleged to have been entered into between the claimants and the United States.

2. Under date of April 30, 1918, the claimants, Hewes & Potter, entered into a proxy-signed contract with the Government, No. P6918-4451Eq, by which the claimants agreed to manufacture 200,000 shovel carriers at \$0.385 per unit, making the total contract price \$77,000, less deductions for material furnished by the United States. There is incorporated in the contract a schedule of material which the Government was obliged to furnish the contractors, amongst which is the following:

“25-inch No. 2 O. D. duck at \$.88 per yard.”

The Government specification upon which the claimants' bid was submitted contained the identical provision.

3. The Government furnished the claimants with 5,680 yards of 25-inch duck, and then notified the claimants that, owing to the shortage of 25-inch duck 18-inch would be substituted, and accordingly furnished claimants with 8,500 yards of 18-inch duck. The claimants continued in the manufacture of shovel carriers when they were informed by Lieut. C. C. Brown, Government inspector in charge of claimants' plant, that owing to the Government's

inability to obtain 25-inch duck it would furnish claimants with 22-inch duck. Lieut. Brown directed the claimants to use the 22-inch duck instead of the 25-inch duck, and urged claimants to speed up production because the shovel carriers were greatly needed. Accordingly the claimants were supplied with 29,340½ yards of 22-inch duck, which they used in completing their contract to manufacture 200,000 shovel carriers, which were delivered and accepted by the Government.

4. On September 30, 1918, the general control section of the Procurement Division, Office of the Chief of Ordnance, forwarded to claimants supplemental contract with first and second amendments, dated August 26, 1918, to amend contract No. P6918-4451Eq, requesting claimants to execute the said supplemental contract and return to the general control section. This the claimants steadfastly refused to do, although frequently requested by the Government. This supplemental contract reserved the right of the United States to furnish the contractors, at the option of the United States, 18-inch O. D. duck at the price of \$0.6336 per yard and 22-inch duck at \$0.7744 per yard instead of 25-inch O. D. duck at the price of \$0.88 per yard, as provided for in the original contract. The prices for duck, based upon the total surface area, are the same in the supplemental contract as in the original contract, but these prices do not take into consideration the question whether duck of a 22-inch width could be cut for shovel carriers with as equal advantage as the duck of 25-inch width, so that there would be an equally small wastage of the material which the contractors had to pay for.

5. On October 16, November 11, and December 16 the claimants wrote the Procurement Division, refusing to sign the supplemental contract, alleging, as a ground for such refusal, that they found that the substitution of 22-inch duck in place of 25-inch duck which the Government was to furnish at the cost of the contractors made a greater wastage when the duck was cut for shovel carriers, which loss fell upon the claimants.

6. On December 21, 1918, the claimants presented their claim for loss sustained by reason of the Government's substituting 22-inch duck for 25-inch duck, which it obligated itself to furnish to the claimants, as a result of which Louis Heuer, inspector at large, Clothing and Equipage Division, Office of the Director of Purchase, made investigation of the claim. The following affidavit of Mr. Heuer is contained in the record:

"I hereby make affidavit to the effect that I personally checked the claim for \$2,660.22 submitted by Hewes & Potter to Major Shinkle in connection with contract No. 4451Eq, calling for 200,000 shovel carriers, and found same to be correct.

"Said claim was based on the fact that the Government did not furnish the contractor cotton duck 25 inches wide, as specified on bid, at the time quotations were submitted and as called for on contract, but furnished some cotton duck 18 inches and 22 inches wide, which could not be cut to an advantage. The price of this duck was figured on the square-yard basis, which was in error, as no allowance was made for the loss to contractor by not being furnished the proper width duck. The price per yard of the 22-inch No. 1 duck was then revised from \$0.7744 per yard to \$0.6838 per yard, which was also in error, as this price did not equal the amount on claim. This price was later on revised from \$0.6838 per yard to \$0.6837336 per yard, which equaled \$2,660.22, the amount of claim."

7. On March 12, 1919, a requisition for a third amendment to contract No. P6918-4451Eq was made, signed by Capt. F. W. D'Olier, in which it is stated:

"This is a requisition for a revision of original order dated 4/30/18, and its revisions to the extent that the price of No. 1 22" O. D. duck be changed from \$0.7744 per yard to \$0.6838 per yard. This revision is necessary owing to the fact that it has been found that 22" duck can not be cut into shovel carriers to the same advantage as 25", hence the price of 22" duck should not have been fixed on a proportionate yardage basis, as shown on second amendment dated 8/26/18, against this contract. All other terms and conditions of the original contract and its revisions are to remain in full force and effect."

On the same date a letter was sent "by authority of the Director of Purchase and Storage," signed by Capt. D'Olier, to the zone supply officer, Boston, Mass., as follows:

"1. Concerning subject contract, you are advised that this office to-day has issued a recommendation for amendment to contract revising the price of 22" duck, wherein it stipulated this width duck at \$0.7784 per yard it has authorized amendment revising price to \$0.6838 per yard.

"2. This revision in price will enable contractor to be credited on his claim of \$2,660.22 by the revision price as above stated on 29,390½ yards charged against this contract."

On March 18, 1919, Capt. D'Olier wrote the Administration Division, contract section, as follows:

"1. Your attention is directed to the papers attached relative to the above mentioned.

"2. This office wishes to advise you of the fact that this amendment as outlined calls for merely a change in the price of duck furnished to the contractor by the Government, owing to the fact that the Government was unable to furnish the proper width of duck as called for on the original contract, and thereby causing a condition wherein the contractor could not cut his material to so great an advantage.

"3. You will note that this requisition for amendment calls for no change in the price of the contract or the allotment. Therefore it is

the opinion of this office that there is no necessity for forwarding your section allotment requisition sheets, as there is no revocation of funds involved. This letter is as per our conversation of even date."

The third amendment to the contract was, however, never adopted owing to the contract having been completed and all the goods accepted thereunder.

It further appears that there was a subsequent attempt made to obtain an allowance of this claim on behalf of the contractors, and on September 18, 1919, Maj. H. B. Williams, Quartermaster Corps, chief of the clothing and textile branch, Office of the Director of Purchase, wrote the zone supply office, Boston, Mass., that—

"The method of determining the price was on the square-yard basis, which was wrong, for the reason that shovel carriers cannot be cut to an advantage out of cotton duck 22" wide. * * * Therefore, the 29,340 $\frac{3}{4}$ yards can be considered as the number of yards delivered and can be charged at \$0.6837336 per yard, which will equal \$2,660.22, the amount on claim filed by Hewes & Potter."

8. It further appears that the claimants manufactured and delivered to the Government in various shipments prior to November 9, 1918, the entire 200,000 shovel carriers which their original contract called for. These articles were accepted by the Government, and payment was made for the shovel carriers at the unit price specified in the original contract, but with deductions for the duck furnished by the Government at a price of \$0.7744 for 22-inch duck and \$0.6336 for 18-inch duck, which was the price named in the supplemental contract of August 26, which the claimants never assented to nor signed, but protested the price therein allowed.

DECISION.

1. On June 30, 1918, claimants entered into a proxy-signed contract with the Government wherein they agreed to manufacture, at a price stated, 200,000 shovel carriers, and the Government agreed to furnish the O. D. duck necessary to perform said contract, of the width of 25 inches, at the rate of \$0.88 per yard.

2. Subsequently, the Government notified the claimants that it could not furnish the duck of 25-inch width, but did furnish duck of 22-inch width, which it directed claimants to use in completion of the contract.

Claimants completed their contract and delivered the 200,000 shovel carriers to the Government and received in payment the stipulated price for the shovel carriers as provided in the contract, with deductions for the 22-inch width duck furnished claimants, figured on the same square-yard basis as the 25-inch duck which the Government had obligated itself to furnish the claimants.

3. It is shown that the 25-inch duck which the Government obligated itself to furnish could be cut, in making the shovel carriers, with very little waste. The claimants' bid was made and the contract entered into on the understanding that 25-inch duck should be furnished by the Government. It was found that the 22-inch duck could not be cut to the same advantage as the 25-inch width, and in cutting the 22-inch duck there was a great waste. This waste obligated the contractors to use and to pay for (by deductions from their contract) a larger quantity of duck of the 22-inch width than they would have used had the Government fulfilled its part of the contract and supplied duck of 25-inch width.

4. The claimants never accepted a proposed modification of the original contract, and protested the deductions made on the Government's valuation of 22-inch duck, contending that the price of 22-inch duck, figured on the square-yard basis, was unjust and unfair, as no allowance was made for the loss occasioned by not being furnished by the Government with the 25-inch duck, which could be cut to advantage.

5. The Board is of the opinion that there arose an obligation on behalf of the Government to reimburse the claimants for the loss they have sustained by reason of the Government's furnishing them and directing them to use 22-inch duck instead of the 25-inch duck which the Government had obligated itself to furnish. In a recent letter to this Board the claimants state they were instructed to cut pick-mattock carriers from the 22-inch duck in combination with shovel carriers, because this combination more nearly suited the most economical cutting of duck. Whatever saving or curtailment of losses resulted from these instructions should be taken into consideration in ascertaining the actual losses the claimants have suffered.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided by subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Mr. Williams and Mr. Eaton concurring.

Case No. 475.

In re **CLAIM OF WALKER KNITTING MILLS.**

1. **REPRESENTATION REGARDING FURTHER ORDERS.**—Where, owing to default in deliveries, a contract for goods is cut down, whereupon the contractor asks a representative of the Government to reinstate the quantity so reduced, and the representative states that he can not do so but will probably be able to give him another contract for that quantity on completion of the first contract, such representations do not amount to an agreement within the meaning of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, based upon an alleged oral promise of a second contract on completion of an existing contract for woolen spiral puttees. Held, claimant is not entitled to relief under the act.

Mr. Patterson writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$28,923.32.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On or about March 20, 1918, the claimant entered into an agreement with the United States of America through Col. H. J. Hirsch, Quartermaster Corps, United States Army, whereby it agreed to furnish and deliver at the New York depot of the Quartermaster Corps approximately 145,000 pairs woolen spiral puttees at \$2.17 per pair, deliveries to be made as follows:

20,000 pairs during April; 25,000 pairs during May; and 25,000 pairs during each of the months of June, July, August, and September, all in the year 1918.

This contract was proxy signed—the signature of the contracting officer being affixed by Capt. H. M. Schofield, Q. M. R. C.—and received the number 1336 N.

2. The contract was negotiated through Frederick E. Haight, who was a civilian in the service of the Quartermaster Corps, in charge of the procurement of sundry articles of clothing for the Army, including puttees. Mr. Haight negotiated and recommended the pur-

chase of large quantities of clothing and his recommendations were uniformly accepted, but he had no contracting authority. The contract was not solicited by claimant, but its representative, Leo A. Baron, called on Mr. Haight, at the latter's request, about March 8, 1918, and was shown a sample of the puttees required, and was asked to see whether he could make them and bid upon a contract.

Claimant produced an acceptable sample and made a bid which was accepted and the above-mentioned contract awarded.

3. The puttee which was the subject of the contract was a new article in the United States which manufacturers of knit goods had no experience in making. The requirements of the Army were estimated at 35,000,000 pairs. It was impracticable for claimant to use the yarns which it had in stock because olive-drab mixtures were required and all the yarns which claimant had at the time were dyed other colors, with the exception of some balances which it had under contract and which it gave instructions should be finished in khaki mixtures.

Claimant immediately upon being advised that it would receive the contract circularized 50 or 60 spinners in the effort to procure suitable yarns, but was unable owing to the condition of the wool market to secure any until after the middle of May. Further delay was caused by the fact that the fulling plants throughout the country had a much greater volume of business thrust upon them than they were in a position to handle and two or three months elapsed before their capacity was increased so that their business could be handled promptly. A further delay in claimant's case resulted from the fact that after it had begun to manufacture puttees in the latter part of May, 1918, it was unable to obtain an inspector to examine and pass upon its goods. As a result of the facts stated claimant was compelled to default in its April and May deliveries, aggregating 45,000 pairs.

4. On or about the 7th day of June, 1918, an instrument bearing date on that day was executed which after reciting the making of the contract of March 20, 1918, above referred to, and that the contractor failed to make delivery of the 45,000 pairs of puttees thereby required to be made in the months of April and May, 1918, modified the said contract by reducing the quantity to be delivered thereunder by 45,000 pairs and continued all other terms and conditions thereof in full force and effect. This instrument recites Col. H. J. Hirsch as the representative of the United States but is signed "Alex. R. Piper, Col. Q. M. Corps, N. A. By John R. Holt, Captain, Q. M. C."

5. The modification set forth in the foregoing finding was sent to the claimant. Mr. George J. Lippman, claimant's president, then had a conversation with Capt. Hoke (Holt?) of the Quartermaster's Department, who told him that unless claimant executed it no pay-

ment would be made for any work that claimant had done. Immediately thereafter Mr. Lippman had an interview with Mr. Haight in which Mr. Lippman asked for the reinstatement of the canceled portion of the contract, stating that claimant had made its commitments for all the raw material necessary for the entire 145,000 pairs of puttees. Mr. Haight's testimony respecting this interview is as follows (S. M., pp. 4, 5, and 6) :

"Q. * * * Did you in your official capacity have any negotiations or dealings with the Walker Knitting Mills with respect to the reinstating of the delinquency—the 45,000?

"A. They came to me and said they had purchased all the raw materials for this 45,000 pairs, and asked that I reinstate the contract. I told them that I could not reinstate it, but as I had a very large quantity to purchase later, there was no reason to believe but that I would be able to give them another contract for 45,000 pairs when they complete the delivery of the 10,000 pairs. * * *

"Q. * * * Just what representations did you make?

"A. The cause of our cancellation originally was that we showed a delinquency, because of nondeliveries, on the books, which was more or less fictitious. The books showed that we were going to deliver in April, May, and June so many million pairs, and they were counting on them in the Quartermaster's Department for service abroad, and we knew that we were not going to deliver them, because they were that much behind, and to make our books show their true balance, we canceled these delinquencies, so that the Quartermaster General could know just what they could count on. That was the first reason. The second was, we thought by cancelling certain portions of the orders we would hasten the deliveries of the balance, which we did; but we had millions to buy more, and knowing that, rather than let the irons get away from us, he was told verbally by me that he had better hold on to them, because we should need all the puttees that we could get."

6. On or about August 24, 1918, Pvt. (afterwards Capt.) Claude Ketcham, in charge of the wool top and yarn branch, Clothing and Equipage Division, under Frederick E. Haight, aforesaid, called on claimant and instructed it to cancel some of its yarn contracts. Claimant succeeded in effecting cancellation of a portion of its commitments, but was unable to cancel all of them.

7. Claimant manufactured and delivered under contract 1336-N a total of 87,130 pairs of puttees. Said contract appears to have been finally settled and adjusted by payment to claimant of about \$22,077. This claim is based upon the alleged promise of Mr. Haight to reinstate the canceled portion of the contract for 45,000 pairs, claimant's contention being that it has suffered through depreciation in value of the yarns purchased a loss of \$28,933.32, which includes an item of \$987.08 for interest and an item of \$1,838.99 for depreciation of special machinery purchased.

8. After the armistice, November 11, 1918, there was no further demand on the part of the Army for puttees and claimant was left with the required amount of yarn for 45,000 pairs of puttees upon its hands, which yarn is not suitable for ordinary commercial use and there is little if any market therefor.

CONCLUSION.

There was no agreement, express or implied, within the purview of the act of March 2, 1919, between the claimant and any officer or agent acting under the authority, direction, or instruction of the Secretary of War or of the President which can be adjusted, paid, or discharged by the Secretary of War.

DECISION.

This board will enter final order denying relief prayed for herein. Col. Delafield and Mr. Henry concurring.

Case No. 594.

In re **CLAIM OF PRATT & WHITNEY CO.**

1. AUTHORITY TO CONTRACT—ONE DIVISION AGENT FOR ANOTHER.—

Where it is established that there was an understanding between the Procurement Division and the Production Division of the Ordnance Department that the latter should act as the representative of the former in a program for increased facilities for the manufacture of pistols, urgently required, the action of the Production Division will be deemed to be the action of the Procurement Division as well.

2. INCREASED FACILITIES.—Where the Production Division, acting for itself, as well as for the Procurement Division, induces a pistol manufacturer to increase its facilities preparatory to taking on large contracts for the manufacture of pistols, and the manufacturer complies with said request, and the orders are not placed by reason of the armistice, there is an agreement on the part of the Government within the purview of the act of March 2, 1919.

3. CLAIM AND DECISION.—Claim is made under the act of March 2, 1919, for \$65,280.17 for increased facilities for making pistols. Held claimant is entitled to recover.

Mr. Howe writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Circular No. 17, 1919, by reason of an informal agreement alleged to have been entered into between claimant and an officer or agent acting under the authority of the Secretary of War.

The claim was originally filed as a class A claim with the Bridgeport (Conn.) district claims board, and was sent by that board to the Claims Board of the Ordnance Department for disposition. It was in turn transmitted by the Claims Board of the Ordnance Department to the Board of Contract Adjustment on the ground that there was not sufficient evidence in writing to establish the claim as a class A claim. The claim was then refiled with this Board as a class B claim, and comes before this Board in that form.

Claimant is a manufacturer of machinery.

The claim is on account of machinery alleged to have been manufactured by claimant at the request of the Government to be used in the manufacture of Colt .45-caliber pistols in accordance with the 1918 pistol requirements schedule of the Ordnance Department, No. 10544.

This claim was heard at the same time as the claims of Manning, Maxwell & Moore (Inc.), No. 1522, and Cincinnati Milling Machine

Co., No. 549, and it was agreed that the testimony and other evidence in connection with all three claims should be considered in connection with each of the claims in so far as applicable.

STATEMENT OF FACTS.

1. Various times between September 21, 1918, and October 8, 1918, the plant section of the Production Division of the Ordnance Department sent to claimant various requests for bids on special machine tools for the manufacture of Colt .45 caliber pistols in accordance with the 1918 pistol program. The officers in the plant section who had charge of this pistol program were Lieut. Robert Coleman and Sergt. T. J. Myers.

2. These requests were made by telegram, and were acknowledged in all cases by letters from claimant submitting details of machines which it was prepared to furnish and prices.

3. The inquiries from the Production Division called for a total of 760 machines. The replies from claimant in response to the inquiries covered the types of machines mentioned in the inquiries and the types of machines that are involved in this claim. The number of machines involved in the claim, however, is 305, which were finally recommended by the plant section for purchase out of the 760 machines of the type originally inquired for and quoted on by claimant.

4. On October 8, 1918, the following telegram was sent to claimant by the Production Division:

"Attention Mr. Blood:

"With reference to our telephone conversation of October seventh, together with telegram of the same date, please be advised that the plant section has recommended the purchase of the following machines: Fifteen vertical surface grinders, fifteen barrel drill grinders, twenty horizontal automatic profilers, fifty spline milling machines, seventy bench milling machines, thirty turret lathes, 14'', five multiple spindle drills, one hundred profiling machines, two-spindle. The above machines have an approximate delivery of March first, or better.

"Production Division 34357, Army Ordnance, T. J. Myers, plant section."

These 305 machines were of the types covered by claimant's previous correspondence with the plant section in response to the plant section's requests for bids above mentioned.

5. It will be noticed that this telegram refers to a telephone conversation of October 7 and a telegram of October 7. There is no evidence in the case in relation to the telephone conversation. But it appears from a letter of October 14, 1918, from claimant to the Office

of the Chief of Ordnance that on October 7 it received the following telegram, presumably from the Production Division:

"Attention Blood:

"With reference to our telephone conversation of this morning, plant section is recommending one hundred profiling machines, two spindle."

These machines are apparently the same 100 profiling machines covered by the later telegram of October 8, so the negotiations of October 7, whatever they may have been, are not of importance in the claim.

6. On October 9, 1918, claimant in reliance on the above telegram of October 8, 1918, began work upon 305 machines of the type stated in that telegram, and prior to November 12, 1918, had completed most of the machines covered thereby and had the balance in process. Claimant appears to have stopped work at the time of the armistice. No formal order or contract was ever issued to claimant and no deliveries were made.

7. Some time in the early part of October, subsequent to the receipt by claimant of the above telegram of October 8 and claimant's beginning performance in reliance thereon, Mr. Blood, the general manager of claimant company, came to Washington for the purpose of procuring a formal order for these machines. He had an interview with Lieut. Col. Winthrop Sargent, at that time chief of the plant section. At this interview the recommendation made by the plant section to the Procurement Division covering the tools in question, and what claimant had already done toward their production, was confirmed by Col. Sargent, and Mr. Blood was told by him to proceed with their manufacture. This statement of Col. Sargent is stated by him to have been made pursuant to authority received by him from Gen. C. C. Jameison, at that time Chief of the Production Division and Assistant Chief of Ordnance. Col. Sargent's account of this interview is as follows (testimony, pp. 180-182):

"I initialed certain papers for General Jameison's signature, which were copies of recommendation to the Procurement Division, for the purchase of machine tools for this pistol program, from Pratt & Whitney. Some time thereafter, in the early part of October, General Jameison called me up to his office, where I met Mr. Blood, who is general manager of the Pratt & Whitney Company. Mr. Blood told the general that the plant section had made some recommendation of machine tools from Pratt & Whitney, and that as usual he had gone ahead and started these machine tools going through the work. He said he had been unable to get the confirming order, and that the plant section were doing all they could, but that things were coming to such a pass that he would either have to have definite instructions to go ahead—an official order for these machine tools—

or quit. General Jameison told me we would have to exercise our authority and see that Mr. Blood continued with the manufacture of these machine tools, as they were vital. So I told Mr. Blood to go ahead with the machine tools and that we would back him up and get the confirming order through.

"What we did was to tell him that we were obligated to see him through that order. In other words, *we confirmed what he had already done.*

"Q. I show you this list of machine tools which claimant has stated in the statement of claim and ask you if that list corresponds with the list that the plant section had which was recommended that an order be placed with Pratt & Whitney for.

"A. It does."

This testimony of Col. Sargent is corroborated by Lieut. Robert Coleman, of the Plant Section.

9. On November 4, 1918, claimant wrote again to the Production Division asking for an order number so that it could secure priorities, and on November 14, 1918, received from Lieut. Coleman a telegram to the effect that purchases were suspended, and claimant ceased operations.

DECISION.

1. As stated in the decision of this Board in the claim of Manning, Maxwell & Moore, No. 1522, and Cincinnati Milling Machine Co., No. 549, the evidence shows that there existed at the time of the transactions covered by this claim an agreement between the Production Division and the Procurement Division of the Ordnance Department to the effect that for the specific purpose of carrying out this particular pistol program, the Production Division was to make arrangements with contractors on behalf of the Procurement Division for starting production at once without waiting for formal contracts or procurement orders, and that the Procurement Division would sustain the action of the Production Division in this respect by approving its recommendations. That this understanding had been reached because this was an increased facilities program, required unusual haste and special tools for its execution, and because the Production Division was considered by both divisions as the better equipped and prepared of the two divisions to place orders in this particular line of business in such a way as to secure prompt results. That this agreement with the Procurement Division, whose contracting power is conceded, was known to both contractors and the Government officials, and that this agreement in view of its origin, nature, and purpose was sufficient to sustain the action of the Production Division officers in the case of this pistol program as the authorized action of the Ordnance Department to the extent of securing tools to manufacture

these pistols and justified contractors in relying in good faith thereon, and in regarding, as authorized orders of the War Department and as the basis of valid contracts, the requests of officers of the Production Division made by these officers for the specific purpose of inducing manufacturers to proceed to secure or manufacture such tools without awaiting the action of the Procurement Division.

2. The evidence shows that Lieut. Coleman and Sergt. Myers, of the plant section, had authority to deal with claimant on behalf of the Production Division for the purpose of securing this pistol machinery, and that they made their representations to manufacturers in these cases for the purpose of having them act on them at once.

3. The evidence also shows that the statement was made to this claimant by Sergt. T. J. Myers, of the plant section of the Production Division, in his telegram of October 8, 1918, that the Production Division had recommended the purchase of the machines covered by this claim, and that claimant's action in reliance thereon was confirmed by Col. Winthrop Sargent, chief of the plant section, in his interview with Mr. Blood in October, 1918, at which time Col. Sargent told claimant to go ahead and that the Production Division was obligated to see him through.

4. The statement by Col. Sargent to claimant amounted to a ratification and adoption of what claimant had already done and an order to proceed to completion of the machines involved in the claim, and constituted an express agreement between claimant and an officer or agent acting under the authority, direction, or instruction of the Secretary of War for the purchase of the tools in question at the prices quoted, which has been performed in whole or in part or on the faith of which claimant has made expenditures or incurred obligations within the terms of the act of March 2, 1919.

DISPOSITION.

1. The Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in Supply Circular No. 17. Purchase, Storage and Traffic Division.

Mr. Williams, Lieut. Col. Junkin, and Mr. McCandless concurring.

Case No. 1816.

In re CLAIM OF CHAMPION IGNITION CO.

1. **TERMINATION CLAUSE—CONSTRUCTION—ALLOWANCE FOR SPECIAL MACHINERY.**—Where the contract contains a cancellation clause requiring the United States, in case it terminates the contract, to reimburse the contractor for a proportionate part of its expenditures in connection with its performance "other than expenditures for plant, facilities, and equipment provided for the performance of this contract," contractor is not entitled to an adjustment for special tools in the nature of equipment used in performing the contract.
2. **FACILITIES, AMORTIZATION OF.**—Where facilities were not bought in contemplation of the contract under which claim is made, but for the purpose of performing prior contracts, the cost of such facilities can not be amortized under the later contract.
3. **CLAIM AND DECISION.**—Claim under paragraph 9, Supply Circular 111, Purchase, Storage and Traffic Division, War Department, November 9, 1918, for special tools. Held, that under the contract under which claim is made, which provides there shall be no reimbursement for plant, facilities, or equipment, claimant not entitled to recover for special tools used in executing the contract.

Mr. Williams writing the opinion of the Board.

FINDING OF FACTS.

This claim, involving a disputed item of \$11,460.95 for special tools claimed in settlement under a formal contract, comes before this Board for determination pursuant to paragraph 9, Supply Circular 111, Purchase, Storage and Traffic Division, War Department, November 9, 1918. This case grows out of the following facts:

1. Under date of November 2, 1918, the petitioner, the Champion Ignition Co., entered into a validly executed agreement (Contract No. DO-5232, Order No. DO-730693) with the United States (by F. D. Schnacke, captain, A. S. A. P., United States Army) for the manufacture and delivery by the petitioner of 2,500,000 metric A. C. aviator spark plugs for a total consideration of \$1,000,000. This contract contained the following cancellation clause (*italic ours*):

"SECTION 2. If, in the opinion of the Director of Aircraft Production, the public interest shall so require, this contract may be terminated by the United States by ten (10) days' notice in writing from the contracting officer to the contractor and such termination shall be deemed to be effective upon the expiration of ten (10) days after the giving of such notice, and shall be without prejudice to

any claims which the United States may have against the contractor under this contract. After the receipt of such notice the contractor shall not order any further materials or facilities, or enter into any further subcontracts, or make any further purchases in connection with the performance of this contract, without written consent previously obtained from the contracting officer, but inspection of the completed articles or work and acceptance thereof by the United States in accordance with the terms of this contract shall continue during such period of ten (10) days as though such notice had not been given. In the event of and upon such termination of this contract prior to completion, as provided in this section (2), for any reason other than the default of the contractor, the United States shall make payments to and protect the contractor as follows: (a) The United States shall pay to the contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination becomes effective. (b) The United States shall reimburse the contractor for such proportion of the contractor's expenditures (*other than expenditures for plant, facilities, and equipment provided for the performance of this contract*) made by the contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated, plus ten (10%) per cent of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States. (c) The United States shall protect the contractor against such proportion of the contractor's outstanding obligations, incurred by the contractor in good faith in connection with the performance of this contract, as is properly and fairly apportionable to the articles or work, the delivery or performance of which is so terminated. The facts to be determined under the above subdivisions (b) and (c) shall be determined by agreement between the contractor and the contracting officer, and in event of their failure to agree shall be determined by three persons, one to be appointed by the contractor, one by the contracting officer, and the third by these two. In the event of the termination of this contract under this section (2), any and all obligations of the United States to make any payments to the contractor under this contract, other than those specified or provided for in this section (2), and in the Article VI hereof, shall at once cease and determine."

2. This contract was terminated by the Government on the 27th day of November, 1918, strictly in accordance with the terms and provisions of the said contract and before completion of the manufacture and delivery of the articles therein mentioned. Negotiations were thereupon entered into between petitioner and the contracting officer for an adjustment of the contract in accordance with the terms of the cancellation clause. There was an agreement between the petitioner and the contracting officer in respect to all items claimed for except the sum of \$11,460.95 hereinbefore mentioned, which petitioner alleged to be due upon the cancellation of

this contract, for special tools alleged to have been purchased and secured for the performance of this contract. The dispute as to whether the Government is liable for this item is the sole matter brought before this Board for determination.

3. The evidence discloses the fact that before the petitioner entered into the written contract above mentioned it was employed as a subcontractor in the manufacture of these spark plugs for a number of other firms having contracts with the Government of the United States, and that all of the tools for which claim is here made had been secured for the purpose of performing this work as subcontractor, and all of these tools were on hand at the time and before the written contract of November 2, 1918, was entered into directly with the Government of the United States (Tr., p. 20); and Mr. Harlow H. Curtice, comptroller of petitioner company, testified (Tr., p. 21) that the provision in the printed form of the contract for the amortization of plant, facilities, and equipment upon cancellation was expressly eliminated for the reason that petitioner had on hand at the time the contract was entered into all the facilities for which claim is here made, and they well knew that no such facilities were intended to be secured for the purpose of fulfilling the written contract for 1,000,000 spark plugs. Capt. McRae, chief of the machinery and tool branch, an expert upon machinery, after carefully examining the schedule embracing the special tools for which claim is made in this case, testified (Tr., p. 46) that there was absolutely nothing contained in said schedules that should not properly come under the head of equipment; to the same effect is the testimony of Lieut. N. C. MacDonald, chief of engine maintenance, United States Army (Tr., p. 50). Mr. Fred G. White, who was the Government representative at the Detroit district office handling these matters, said (Tr., p. 51):

"There is no question in the world about it. There is no question that the payment on these \$11,000 worth of tools is not due under the written contract. There is no question about that, but I do think it is due because we should have put it in the Detroit district."

And Mr. Curtice himself said (Tr., p. 51):

"I agree with Mr. White on that. I can not see how it can come under this clause [meaning the cancellation clause in the written contract] as an implied contract."

4. The testimony throughout goes to show that petitioner, at the time and before the written contract was canceled, was engaged in the manufacture of spark plugs upon a number of contracts, one (the one here in dispute) directly with the United States, and a number of contracts with firms that were engaged in work for the Government. A large number of special tools had been secured especially for the contracts which petitioner held as subcontractor.

After the armistice and when all these contracts were canceled, the Detroit district office, in attempting to effect settlement for these special tools and facilities acquired by petitioner for all of its spark-plug work, undertook to lump the entire sum due petitioner and to apportion it amongst all of the contracts held by petitioner, including those which it held as subcontractor and the one which it held direct with the United States.

DECISION.

1. This Board is of the opinion that there is no item of special tools for which compensation is claimed by petitioner which, under the facts and circumstances of this case, must not appropriately be embraced in the term "plant, facilities, and equipment," as to which the Government of the United States in the contract of November 2, 1918, expressly relieved itself of liability in case of a termination of the contract in accordance with the termination clause. Moreover, it is very clear from the testimony in the case, especially that of Mr. Curtice, the comptroller of petitioner company, that none of these tools were secured or provided for the performance of the contract for 2,500,000 spark plugs. This Board therefore holds that the contention of the contracting officer is correct that in a settlement under the terms of the contract No. DO 5232 of November 2, 1918, any item which is here claimed by the petitioner on account of special tools should be eliminated from the settlement.

2. If it is a fact (as indicated by the evidence adduced in this case) that the Detroit district office, in an effort to adjust all the contracts upon which the petitioner was engaged in the manufacture of spark plugs for aviation needs, lumped the entire sum petitioner was entitled to receive for special tools and facilities and apportioned or left any of that sum to be paid or applied in the settlement to be made under Contract No. DO 5232, and this resulted in the receipt by the petitioner in settlement of its contracts for such spark plugs of a less amount for special tools and facilities than it was entitled to receive, then this Board deems it appropriate to recommend to the Claims Board, Air Service, that the claims affected be reopened and readjusted so as to absorb and pay off in settlement to the petitioner such sum for special tools and facilities as was inappropriately allotted to the settlement to be made under Contract No. DO 5232.

DISPOSITION.

A copy of this finding of fact and decision will be transmitted to the Claims Board, Air Service, for its information and for consideration of the recommendation herein contained.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 1192.

In re **CLAIM OF JOHN M. SUTTON.**

1. **NO AGREEMENT.**—Where claimant, a lawyer, was contemplating a trip to Mexico City, and secured from the Chemical Warfare Services the prices they would pay for palm nuts, and made the trip, but bought no nuts, nor tendered any to the Government, there is no agreement on the part of the Government to pay claimant's expenses.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$390.97, expenses to Mexico City. Held, claimant is not entitled to recover.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim comes before the Board as class B informal and is made by Mr. John M. Sutton, of Ovid, N. Y., who, though an attorney, was incidentally interested in palm products in Mexico. Claim is made for reimbursement for expenses incurred during a trip to Mexico during the months of September and October, 1918, for the purpose of investigating the source of supply of palm nuts and providing facilities whereby the nuts could be gathered and transported to ports of shipment.

2. Claimant, apparently already contemplating a trip to Mexico, wrote to the Chemical Warfare Service on August 8, 1918, then being on the Pacific coast, that he had a correspondent in Mexico City who wished him to consider the development of a project in connection with palm nuts and further:

"If you would be interested, I would be glad to have the specifications, prices, and terms under which such material * * * in the shape of whole nuts * * * could be used by your department in order that I might be as definitely informed as necessary."

A reply to this was written on August 21 by Capt. Macomber, carbon procurement officer of the Chemical Warfare Service, setting forth the current prices and also outlining plans already made for securing nuts from other southern Republics. On August 26, 1918, claimant again wrote to the Chemical Warfare Service requesting a

trial order for 200 tons, the reply to which by Capt. Macomber, under date of September 5, was in part as follows:

"I am in receipt of your letter dated August 26th, from Portland, Oregon. It will be impossible for us to send you a trial order for, say, 200 tons of nuts from Mexico. We can not put any indefinite order through. As we wrote we are willing to pay the price of \$15.00 a ton f. o. b. any ports and supply the necessary bags or pay a reasonable price for them. I think the best way would be for you to write us or cable us from Mexico if you are contemplating a trip there and tell us approximately what quantity of nuts you can offer at these terms after you have made a survey of the territory. We then can make up an order for you."

3. It is the contention of the claimant that this letter creates an implied agreement upon the part of the United States to reimburse him for any expenses incurred in locating the source of supply of nuts.

4. Upon being questioned as to whether or not he ever actually tendered delivery of any nuts, claimant stated that he had at the time he wrote, asking for a trial order, in prospect, three or four hundred tons of nuts, but he learned later that his prospective seller did not have title to the nuts and that he subsequently decided not to take them. It appears from the testimony that even though the claimant had tendered a quantity of nuts, there were still several conditions to be met as to the question of time of delivery with also the possibility that the United States would not be in the market for them at all.

5. The testimony of both claimant and Capt. Macomber is in agreement that no request that claimant undertake the trip to Mexico was made.

DECISION.

1. The letter relied upon by claimant to substantiate his claim does not expressly or by implication authorize him to incur any expenses for which the United States will be obligated to reimburse him; and the phrase "if you are contemplating a trip," and the further phrase, "and tell us approximately what quantity of nuts you can offer at these terms," indicate clearly that the venture was one entirely of claimant's own responsibility and constituted nothing more than an ordinary business chance.

2. Upon the facts shown, therefore, this Board is unable to make an award covering any part of the claim made.

Col. Delafield and Mr. Williams concurring.

Case No. 2333.

In re **CLAIM OF IRON KING OVERALLS CO.**

1. **NO LOSS SHOWN BY CLAIMANT.**—Where claimant is unable to show that any work was done under an alleged contract, or that any expenditures or commitments were made on the faith of the contract, claimant is not entitled to relief under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a written notice that a contract had been awarded claimant for the manufacture of woollen trousers. Held, claimant having made no expenditures or commitments, is not entitled to relief.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Claim is made by the Iron King Overalls Co., a copartnership of Baltimore, Md., engaged in that city in the manufacture of woollen garments. The claim is class B, based upon an alleged informal agreement entered into between the claimant and the United States for the manufacture of 40,000 pairs of woollen trousers.

2. The proof is to the effect that a member of the claimant company visited the New York depot quartermaster sometime during the last week in September, 1918, with a view to securing an additional contract for trousers which might be commenced after the completion of a contract which was then in the course of performance. Claimant was informed in the New York office that the previous approval of the Baltimore district's quartermaster office would be required before a contract could be awarded. This approval, by Maj. D. W. O'Neill, was secured by claimant and on October 31, 1918, a notice was mailed to claimant from the New York depot quartermaster in the form of the usual Schedule A, advising that a contract had been awarded to him for 40,000 pairs of woollen trousers, which notice or schedule set forth all the terms and conditions of the prospective contract. No production was ever had upon this informal contract.

3. Immediately after receipt of this notice Maj. O'Neill shipped to the claimant a portion of such of the materials as the Government was, by the terms of the proposed contract, to furnish. The formal contract was never put through, however, owing to the intervention of the armistice.

4. Claimant submits a claim for reimbursement for expenditures made upon the faith of this agreement.

DECISION.

1. While claimant has undoubtedly proved the existence of an informal contract for the manufacture by him of woolen trousers for the United States, he fails to show that by commitment or otherwise he has incurred an expense upon the faith of the agreement. Various claims were made for materials purchased and machinery leased, as well as for the lease of a building, but, upon being carefully examined upon these items claimant stated he was unable to testify that these expenditures were expressly for this particular contract, as the building, machinery, and materials were used partly for the performance of his earlier contract upon which he was then working, and have, since the signing of the armistice, been used in his commercial work. As a matter of fact, the claimant stated that his claim was based upon his understanding that other contractors were being awarded an arbitrary sum on their contracts for each pair of trousers canceled, and he would like, if possible to have this canceled informal agreement adjusted upon the same basis.

2. Claimant not having shown that any money was expended or expense was incurred by him expressly upon the faith of this informal agreement, this Board is unable to recommend an award for any part of the amount claimed.

Mr. Williams and Mr. Hunt concurring.

Cases Nos. 1807-1808.

In re CLAIM OF ARCHIBALD WHEEL CO.

1. **RECOMMENDATION OF AN AWARD.**—A recommendation that claimant be awarded a contract is not an agreement within act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral agreement relating to the manufacture of artillery wheels. Held, claimant is not entitled to relief.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This is a statement of claim, Form A, filed originally with the Claims Board, Bureau of Ordnance, and denied by that board. It is transmitted here on appeal by the claimant pursuant to Supply Circular No. 46. A hearing was afforded claimant on December 30, 1919.

FINDING OF FACTS.

Claimant prior to the manufacture of artillery wheels by the Rock Island Arsenal and for some 40 years was the principal source of supply of such wheels. During the late emergency also it delivered to the Army large quantities. It appears that there were some 13 other producers and that the claimant delivered the largest number. It was able to do this principally because it acquired necessary raw materials in such season as to enable it to accept contracts when offered. Wood (hickory and ash) requiring a period of months for drying and transportation, its acquisition had necessarily to take place a corresponding period before production could begin. Forests had to be cut in remote sections of Arkansas, the wood sawed and hauled out by team to railroads, transported by rail to the claimant's factory at Lawrence, Mass., and placed in the process of drying, etc.

George B. Nichols, jr., major, was chief of the Artillery section, Procurement Division, Ordnance, and Capt. Arthur Day, as his subordinate had charge of the buying of all artillery wheels at the times hereafter set forth. A description of procedure in this section follows:

A statement of requirements was prepared by the Requirements Division from time to time and was sent to the Procurement Divi-

sion. Procurement then requested present and prospective contractors to submit bids for the material desired within fixed periods. The Production Division was asked to make recommendations as to the efficiency and capacity of contractors. Upon consideration of the bids and information thus elicited, the Procurement Division determined upon particular contractors and quantities. (R., 29.) When a decision to place an order was arrived at by Capt. Day, his practice was to communicate with the accepted bidder by letter, advising him that a contract would be given him, subject to the approval of the board of review, for the articles and at the price named. The board of review was set up in the Procurement Division to pass on all contracts issued, particularly with respect to the financial standing of the contractors. Its approval was not automatic under the orders controlling the operation of the Procurement Division. However, it was the practice for Capt. Day in this form letter to say, "you are requested to begin construction of this material at once." This practice was acquiesced in by the division for a long period. Immediately upon writing this letter it was Capt. Day's practice to make out a requisition for a formal contract to be issued in favor of the contractor. Maj. Nichols would approve this requisition and it would then be sent to the contract section where the attorneys drew up the formal contract, which, after having received the approval of the board of review, would be returned to Capt. Day in order that he might ascertain whether the written instrument expressed the intention. If so, the contracting officer of the division would sign the contract and send the appropriate number of copies to the contractor for his signature. (Rec., 31.) The chief of section in no case modified the requisitions as made by Capt. Day for contracts, except in case of error as to form. It was not his practice to modify the agreement in any manner. (Rec., 31.)

On October 26, 1918, Capt. Day invited bids of the Archibald Wheel Co. and the St. Marys Wheel & Spoke Co., of St. Marys, Ohio, for the delivery of two thousand three hundred 60-inch artillery wheels (the estimate of requirements then unprovided for). Both companies submitted bids and an order was placed with the St. Marys Wheel and Spoke Co. for the delivery of 2,381 such wheels.

At the times herein set forth, Abbott L. Norris was a lieutenant in the Production Division, Ordnance Department. His duty was in general to further an uninterrupted flow of artillery wheels for the Army, and in particular to collect and collate information as to the requirements of the Army and the abilities of contractors in this field, with a view to advising the Procurement Division in the placing of orders. (R., p. 6 et seq.) From time to time Lieut. Norris visited the plant of the claimant, and from time to time Mr. Archibald, the treasurer of the claimant, called at the offices of

Lieut. Norris and of Capt. Day and secured from them such information as to the probable requirements for artillery wheels as they were authorized and able to give. Upon the information so acquired and upon his own estimate of the situation Mr. Archibald from time to time ordered the cutting of hickory timber in advance and otherwise placed himself in readiness to accept what contracts might be awarded to him.

On or about November 2, 1918, Lieut. Norris recommended to Capt. Day that the claimant company be given an order for two thousand 60-inch artillery wheels and the St. Marys Wheel & Spoke Co. an order for 1,000 such wheels. Capt. Day, however, upon consideration of the matter and after inviting bids, as stated, placed the order for the entire quantity with the St. Marys company. On October 31, 1918, Mr. Everett H. Archibald, the treasurer of the claimant company, was in the office of Lieut. Norris. Lieut. Norris inquired whether or not Mr. Archibald would be able to deliver certain wood stock for certain requirements of the Government by December 20, 1918. Mr. Archibald replied that he would ascertain by inquiring of his representative in Arkansas. Accordingly the following telegrams were exchanged:

Telegram dated October 31, 1918, signed "A. L. Norris, Army Ordnance," to J. Allen Russell, Kingsland, Ark., care Archibald Wheel Co. (Russell was the Arkansas agent of the Archibald Wheel Co.) (Rec., p. 10.)

"Will you guarantee to ship Archibald six thousand pieces five and one-half by three and one-half by one naught eight rim strips by December twenty? This is very important to our fighting forces. Wire reply promptly."

On November 1, 1918, the following telegram was sent from Kingsland, Ark., to the Office of the Chief, Army Ordnance, Washington, D. C. (Rec., p. 18):

"If can use hickory, ash, and oak, feel sure can fill order by December 20. While waiting your reply will investigate matters and give more definite answer to-morrow. The different kinds of wood will mean much from production standpoint."

On November 1, in reply to above telegram, this telegram was sent. (Rec., p. 18):

J. ALLEN RUSSELL,
Care Archibald Wheel Company,
Kingsland, Arkansas:

Rims must be hickory or ash, not oak. Wire information both here and at Lawrence at once.

E. H. ARCHIBALD,
Army Ordnance.

The answer to above is dated November 2, from Kingsland, Ark., to A. L. Norris, Office Chief, Army Ordnance, Washington. (Rec. 19.)

"It is my aim to fill order by December 20, and firmly believe I can do it. Could be prevented by sickness or death, but will do my best.

"J. ALLEN RUSSELL."

Personal telegram from Mr. E. H. Archibald, from Washington, to J. Allen Russell, at Kingsland, Ark. (Rec., 20.)

"Norris wire you for hickory and ash only. Do hope you can deliver on time as large order depends. Also how soon could you deliver one thousand 4 $\frac{1}{2}$ x7x90 ash. This is not an order. Wire reply to Lawrence. Going home to-day."

On November 5, 1918 (Rec., p. 52), the following letter was dispatched to the claimant:

"I am directed by the Chief of Ordnance to acknowledge receipt of your letter of October 29th, file P 473.817/1229. You are advised that the order for 60-inch artillery wheels was placed with the St. Mary's Wheel & Spoke Company, St. Mary's, Ohio, at \$57 each, which included camouflage painting. It was thought that the St. Mary's Wheel & Spoke Company would be able to make deliveries sooner than you could have done on this order."

The claimant then wired Russell, its agent in Arkansas, to stop production. Nevertheless, according to the statement of claim, the claimant company had left over in excess of its contract requirements 15,750 dry spokes, 522 dry half rims, 617 green half rims. The approximate value of this material is \$13,500.

On October 22, 1918, the claimant wrote Capt. Day as follows:

"1. We received your telegram of the 19th instructing us to enter an additional order for 13,000 56" artillery wheels and have also received letter of the 19th confirming same, and we will make every effort to complete deliveries as per schedule named.

"2. We have also been preparing stock in advance for possible anticipated order of 60" wheels and we are still preparing stock for this size wheel. May we expect to receive order for this size?

"3. As the matter is quite important to us, as we would not wish to accumulate a quantity of this stock without prospect of receiving orders, we have sent you a day letter reading as follows:

"'Have received order 56" wheels. Have been preparing stock for 60" wheels also.'

"4. We trust that we may hear from you promptly in regard to this matter of 60" wheels."

DECISION.

It appears with a fair degree of clearness from the foregoing facts that the material left in the hands of the claimant was acquired in anticipation of contracts rather than upon the faith of any represen-

tation made by Capt. Day or by Lieut. Norris. Upon October 22, 1918, the claimant writes that it has been preparing stock in advance for possible anticipated order of 60-inch wheels and that it is still preparing stock for this size wheel and inquires whether it will receive order for this size. Following up this letter, the claimant's treasurer called upon Lieut. Norris about November 1, 1918 (Rec., 23) who recommended to Capt. Day that an order be placed. It would appear that this recommendation was made after November 4, 1918, when Mr. Russell's telegram of November 2 was received. (Rec., 19.) Mr. Archibald was then in Lawrence. (Rec., 21, 23.) This circumstance would tend to show that Lieut. Norris did not tell Mr. Archibald that he would get this order. Furthermore, Mr. Archibald's telegram clearly indicates that the order was then still in expectation. Mr. Archibald left Washington on that day. The surrounding circumstances are such as to corroborate Lieut. Norris's testimony to the effect that he did not do more than tell Mr. Archibald that his company would be recommended if Russell's reply should be satisfactory. (Rec., 16.)

Capt. Day testified that he had no recollection of telling Mr. Archibald that he would get an order for 60-inch wheels. (Rec., 37.) He did place a large order (13,000) at about this time (Oct. 19, 1918) with the claimant for 56-inch wheels but placed the order for the 60-inch wheels with the St. Mary's Company in accordance with the policy of keeping all producers occupied. (Rec., 33.) The price submitted by that company included camouflage, whereas the claimant's bid did not.

It must be concluded that no such agreement was made as alleged by the claimant.

The claimant also claimed that the same officers made certain representations with respect to an order for 1,240 and 1,350 M. M. wheels, but no evidence tending to support this claim was adduced and it was not urged at the hearing.

DISPOSITION.

An order will be entered denying the claim.
Mr. Williams and Mr. Harding concurring.

Case No. 1581.

In re CLAIM OF ELYRIA ENAMELED PRODUCTS CO.

- 1 **BREACH OF CONTRACT.**—Where claimant's contract to furnish the Government certain enamel cast-iron articles was canceled by the Government by reason of claimant's breach, there is no obligation on the part of the United States Government to reimburse claimant, under the act of March 2, 1919, for loss sustained in connection therewith.
2. **CLAIM AND DECISION.**—This claim is presented under the act of March 2, 1919, upon the theory that the United States Government is obligated to reimburse claimant for expenses incurred in preparing to perform its contract, which was canceled by the Government before substantial deliveries were made. Held, that the contract being canceled by the Government because of a breach by claimant, that claimant is not entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$432.73, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. On or about June 2, 1918, Dr. James R. Withrow, chemical engineer attached to the American University, Research Division, arranged with claimant corporation to make and deliver to the chemical warfare section, Research Division, at the American University, 4 cast-iron sections, 2 covers, 4 flanged ells, and 4 cast-iron enameled nozzles.
3. Thereafter the American University Experiment Station, by Lawson Stone, O. R. D., superintendent, on July 5, 1918, issued to claimant Order No. GI-9509 in the following words and figures:

CHEMICAL WARFARE SECTION, RESEARCH DIVISION,
AMERICAN UNIVERSITY EXPERIMENT STATION,
Washington, D. C.

Order No. GI-9509.

Quantity.	Material.	Amount.
4.....	Cast-iron sections enameled with No. 11 enamel 14" dia., 24" long.....
2.....	Covers, 1 for top and 1 for bottom of 4 sections when joined.....
4.....	Flanged ells enameled to fit outlets on top and bottom.....
4.....	2" cast iron enameled nozzles to fit inside the 3" openings into the covers for top and bottom.....

Ship at earliest possible moment.

Ship by express prepaid. American University Experiment Station, Washington, D. C.,

AMERICAN UNIVERSITY EXPERIMENT STATION,
LAWSON STONE, *O. R. D. Superintendent.*

4. Thereafter, on June 25, 1918, the experiment station, American University, Washington, D. C., was placed under the control of the War Department by the following Executive order:

EXECUTIVE ORDER.

It is hereby ordered that the Experiment Station at American University, Washington, D. C., which station has been established under the supervision of the Bureau of Mines, Interior Department, for the purpose of making gas investigations for the Army, under authority of appropriations made for the Ordnance and Medical Departments of the Army, together with the personnel thereof, be, and the same is hereby, placed under the control of the War Department for operation under the Director of Gas Service of the Army.

WOODROW WILSON.

THE WHITE HOUSE,
25 June, 1918.

5. Claimant company proceeded to manufacture the articles called for in GI-9509 and expended money and labor upon the performance of said order.

6. On November 13, 1918, the Chemical Warfare Service, under which the experiment station, American University, had been placed by Executive order, *supra*, canceled Order No. GI-9509 for failure of claimant to deliver the goods called for in said order.

7. On December 21, 1918, J. C. Roth, second lieutenant, Chemical Warfare Service, United States Army, chief, purchase and supply, Research Division, Chemical Warfare Service, wrote claimant as follows:

"2. We wrote you under date of August 13th, Sept. 4th, Sept. 17th, Sept. 23rd, Sept. 30th, Oct. 9th, Oct. 25th and Oct. 31st and then not having received any satisfactory information in reply to these communications, we cancelled the order under date of November 13th."

DECISION.

1. The contract with claimant company, No. GI-9509, was canceled by the Government for breach by claimant in failing to deliver within a reasonable time.

2. It is the opinion of this Board, therefore, that the claimant is not entitled to recover.

DISPOSITION.

1. A final order denying relief will issue.

Mr. Williams and Mr. McCandless concurring.

Case No. 1960.

In re CLAIM OF HAWKBRIDGE BROS. CO.

1. **CONFUSION OF ORDERS.**—Where a purchasing agent at the Watertown Arsenal called claimant by telephone and ordered 174 feet of steel, and told claimant that the order number would be 646, and claimant proceeded to fill the order, and afterwards received a written order, No. 1484, for a similar quantity of steel, and proceeded to fill that one as a second order, claimant was justified under the circumstances in considering the second order as an additional independent order.
2. **INFORMAL ORDER.**—An order orally given by an authorized officer in the Ordnance Department but not subsequently confirmed in writing is not within section 6854 of the Compiled Statutes.
3. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$4,710 for performing an oral order, claim being appealed to this Board from the claim board of Watertown Arsenal. Held, claimant is entitled to recover.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim comes before this Board on appeal from a decision of the claims board of the Watertown Arsenal denying claimant the relief sought. The claim is class B informal, and based upon a telephone order for 170 feet of high-speed tool steel, amounting to \$4,710.36.

2. On or about July 12, 1918, Mr. Lennan, assistant purchasing agent of the Watertown Arsenal, called claimant's office on the telephone, making inquiry for high-speed tool steel of special sizes and lengths. He was advised by the claimant that steel of the dimensions and analysis required could be supplied, and accordingly an order was given during such telephone conversation for 170 feet of this steel of size $2\frac{1}{4}$ by $1\frac{1}{2}$ and in multiples of 13 inches. This order was immediately communicated by claimant to its shop in Syracuse, N. Y., and the steel shipped as directed to the Electric Welding Co., in Cleveland, Ohio, where these lengths were to have butt-welded upon them 11 inches of carbon steel and to be made into tools and shipped back to Watertown Arsenal. Shipment was made on or about July 31 to the Electric Welding Co., which company subsequently converted the material into tools which are now on hand at Watertown Arsenal.

3. When this material was shipped, Mr. Clapp, of the claimant company, called up Mr. Lennan and inquired the purchase-order number which would be issued to cover this telephone order, as it was necessary to have this order number in billing the United States for the steel, and he was advised by Mr. Lennan that the purchase-order number would be 646.

4. About one month after this telephone order was placed, Hawkrige Bros. received a purchase order bearing number 1484 for a similar quantity in the same size and lengths of the high-speed tool steel, which order they assumed to be a new one, but, as a matter of fact, it was intended by the Watertown Arsenal merely to be in confirmation of the telephone order of July 12. This second order was filled, the material shipped, and claimant has received the purchase price therefor.

5. Mr. Clapp, office manager of the claimant company, testified that it had been the custom for the arsenal to confirm all telephone orders by a purchase order which stated on the face thereof "In confirmation of telephone order," and that when a purchase order was received which did not state it to be in confirmation of a previous oral order, that it was considered as being a new order and was filled as such. Mr. Clapp further testified that when a telephone order is taken a memorandum order is made out in the claimant's office giving the quantity and nature of the material ordered and also the purchase order number it will bear. In substantiation of the custom testified to 14 purchase orders, to each of which was attached claimant's memorandum of telephone order, were offered in evidence, and upon each such purchase order there appeared the words quoted above, indicating that they were confirming a telephone order. The order for this high-speed tool steel received by claimant in August did not state that it was in confirmation of a telephone order. Further order memorandums were offered by claimant showing that it was not unusual to receive two orders for exactly the same amount of the same materials, both with respect to dimensions and analysis.

6. Mr. Clapp, of the claimant company, further testified that his company received so many orders from Watertown Arsenal that it was impossible to keep in mind any particular one. That there were so many orders placed by the arsenal with his company that he spent a large part of his time on the telephone with representatives of the Watertown Arsenal in taking and filling such orders.

DECISION.

1. The testimony and evidence clearly indicate that claimant was justified in assuming that the purchase order which was received August 17, 1918, was not to be taken as confirming the telephone

order given on July 12, but as being an entirely new order for the same quantity of the same material, and no bad faith or negligence can be imputed to the claimant for having filled it. Claimant having filled the telephone order for 170 feet of this steel, places an obligation upon the United States to pay him the fair and reasonable price thereof, which in this case is shown to be \$4,710.36, covering 2,309 pounds, at \$2.04 per pound.

The agreement, though to be performed within 60 days, is informal. Section 6854 of the Compiled Statutes provides that contracts to be performed within 60 days may be made under such regulations as the Chief of Ordnance may prescribe. The Chief of Ordnance has, by section 171 of General Orders No. 7 of the Ordnance Department, dated October 14, 1917, prescribed that oral contracts must be confirmed in writing. This oral agreement, therefore, never having been confirmed in writing, is informal and must be considered as such.

DISPOSITION.

1. This Board will cause the amount due to claimant to be computed in accordance with supply circulars of the Purchase, Storage and Traffic Division and a statutory award issued to claimant for the amount found to be due and such award transmitted to the appropriate disbursing officer for payment.

Col. Delafield and Mr. Huidekoper concurring.

Case No. 2444.

In re **CLAIM OF B. F. GOODRICH RUBBER CO.**

- 1. AUTHORITY OF CONTRACTING OFFICER, WHERE TERMINATION CLAUSE, TO ALLOW CONTRACTOR TO RETAIN MATERIALS AT SALVAGE VALUE—SUPPLY CIRCULARS 88 AND 111 CONSTRUED.—**Where a contract contains a termination clause according to the form prescribed by Supply Circular 88, providing that materials in process at termination shall be paid for by the United States and on being so paid for, shall become the property of the United States, a contractor may, nevertheless, enter into a supplemental agreement by which the contractor is permitted to retain materials not wanted by the Government at an agreed salvage value. Supply Circular 111, in directing termination in accordance with termination clause where there is one, authorizes such a provision in the settlement contract.
- 2. SAME—SUBMISSION TO SALVAGE BOARD.—**Where a termination agreement is tentatively agreed to, before the final draft, the contracting officer should submit the question of whether the agreed figures constitute a proper basis of salvage or not to the salvage board of his bureau for its approval.

Mr. Henry writing the opinion of the Board.

DECISION.

1. No questions of fact are at issue in this case. The opinion of the Board of Contract Adjustment is requested by the contracting officer, M. & E. M. branch, Regular Supplies Division, office Director of Purchase, on a question involving the construction of War Department Supply Circular No. 88, September 7, 1918, and War Department Supply Circular No. 111, November 9, 1918.

2. The contract in question embodied the following paragraph, inserted according to Supply Circular No. 88:

“(b) The United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expenditures for plant, facilities, and equipment solely provided for the performance of this contract) made by the contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated, plus 2 per cent of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States.”

Supply Circular No. 111 provides:

"2. Whenever such contract or order expressly provides that it may be terminated in the public interest, termination may be effected only in accordance with such provisions, unless it shall be in the public interest to terminate it in accordance with the provisions of this circular and the parties shall agree thereto."

3. The question is: Is a contracting officer, in drawing up a settlement contract for a contract containing the above-quoted clause, authorized to insert a provision permitting the contractor to retain the materials paid for under the above-quoted paragraph, at a salvage value agreed upon between him and the contractor?

4. Section 6 of Supply Circular 111 provides:

"6. If agreement is reached on a just and reasonable compensation to be paid to the contractor by reason of the suspension and termination of the contract or order, such agreement shall be embodied in a supplemental contract, which shall set forth the agreed compensation and shall provide in specific terms that it constitutes full and final settlement of all questions and claims growing out of the original contract or order. Such supplemental contract shall also provide that all raw materials, partly finished products, and finished products on hand shall become the property of the United States, unless and to the extent that the parties agree that such materials and products shall remain the property of the contractor, in which event the Government shall be credited with the agreed value of the same."

5. It is the opinion of this Board that paragraph 6, above quoted, applies in all cases; those in which termination of a contract is effected in accordance with the provisions of the contract, and those which are terminated in accordance with the supply circulars of the War Department. The contracting officer is therefore authorized to draft a supplemental contract permitting the contractor to retain the materials at an agreed salvage value.

6. It is further the opinion of this Board that even if paragraph 6 of Supply Circular 111 applied only to contracts in which there was no termination clause, that nevertheless, under paragraph 2 of Supply Circular 111, the contracting officer would have the authority to draft a supplemental contract permitting the contractor to retain materials at an agreed value in contracts containing the above-quoted termination clause. Paragraph 2 of Supply Circular 111 expressly states that termination may be effected only in accordance with the provisions of the contract, "unless it shall be in the public interest to terminate it in accordance with the provisions of this circular and the parties shall agree thereto." Ordinarily, when two alternatives are presented, it would not be proper to resort to one of them and then resort to the other alternative for a special purpose. But it will be observed that the method of termination provided in the

termination clauses required to be inserted in the contracts by Supply Circular 88 very closely resembles the method of termination provided for in Supply Circular 111 and subsequent supply circulars for termination of contracts where there are no termination clauses. The general plan and spirit of both are the same. It is believed that Supply Circular 111, in paragraph 2, directed that where there was a termination clause, termination should be effected only in accordance with such provision, for the purpose of giving the United States the advantage of any provisions in the termination clauses; for example, one allowing the Government to terminate the contract within a definite number of days. But where, as in the question under consideration, it is clearly in the public interest to allow the contractor to retain materials which the Government does not want at their salvage value, it was not the intention of the War Department to tie the hands of the contracting officer and prevent him from drawing a supplemental contract with such a provision clearly in the public interest.

7. The above construction of the supply circulars is in accordance with the practice of the War Department. Before drawing up the final draft of the supplemental contract the contracting officer should submit the question of whether the agreed figures constitute a proper basis of salvage or not to the salvage board of his bureau for its approval, or to the proper board or person which has jurisdiction of the question of salvage in the bureau.

Col. Delafield concurring.

Case No. 2420.

In re **CLAIM OF THE WHITE MOTOR CAR CO.**

- 1. CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, Form B, for the purchase from claimant by the United States of certain material, at an aggregate price of \$157.25. Held, it appearing that said claim has been paid, it is dismissed.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17 for \$157.25.
2. On or about October 14, 1918, an informal agreement was entered into between the claimant and Second Lieut. Earl B. Walker, Quartermaster Corps, for the purchase by the United States from the claimant of certain material at an aggregate price of \$157.25.
3. It appears that the claimant received payment of the amount on October 24, 1919.

DECISION.

The claim, having been paid, should not be allowed by this Board.

DISPOSITION.

An order will be entered dismissing the claim.
Col. Delafield and Mr. Price concurring.

Case No. 2421.

In re **CLAIM OF THE WHITE MOTOR CAR CO.**

- 1. CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, in Form B, and is for the rental to the United States of one front service wheel. Held, that the claim having been paid same is now dismissed.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17 for \$29.
2. On or about May 22, 1918, an informal agreement was entered into between the claimant and J. Powell, assistant to Second Lieut. Earl B. Walker, Quartermaster Corps, officer in charge of the carriage transportation division, Quartermaster Corps depot, Philadelphia, Pa., for the rental to the United States for 29 days of one T. A. D. front service wheel at \$1 per day.
3. It appears that the claimant received payment of this amount on October 17, 1919.

DECISION.

The claim, having been paid, should not be allowed by this Board.

DISPOSITION.

An order will be entered dismissing the claim.
Col. Delafield and Mr. Price concurring.

Case No. 1839.

In re **CLAIM OF LAMBERTVILLE RUBBER CO.**

1. **CONTRACT TO BE CONSTRUED AS A WHOLE.**—Where claimant was manufacturing certain articles for the Quartermaster Corps, under a proxy-signed contract and afterwards entered into a supplemental contract, whereby the original contract was modified by decreasing the number of articles to be taken by the Government, and by making other changes, and said supplemental contract contained a clause providing a mutual release by each party in favor of the other of all claims arising out of the modification of the original contract, the apparently repugnant provisions of the supplemental contract should be reconciled and the contract construed to give effect to all its provisions, and applying said principle, it is held that by the terms of said supplemental contract the Government was released from all obligations except those imposed by the modified or supplemental contract.
2. **CLAIM AND DECISION.**—Claim is made for \$508.73 for rubber gaiters under act of March 2, 1919, but is treated as having arisen under General Order 103. Held, that the claimant is entitled to relief, which may be worked out in accordance with provisions of Articles I, II, and III of the supplemental contract.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$508.73, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On or about April 27, 1918, the claimant and the United States entered into a written contract which is signed in behalf of the Government by H. J. Hirsch, colonel, Quartermaster Corps, in type-writing, and by Capt. S. W. Shaffer, who signs in ink, and numbered 2485-N. It is, therefore, a proxy-signed contract. It called for the manufacture and delivery by the claimant of approximately 11,888 pairs of four-buckle all-rubber gaiters at "a tentative price of \$3.15 per pair." The tentative price was subject to such readjustment as should be determined by the Price Fixing Committee of the War Industries Board. On September 18, 1918, a supplemental agreement was entered into which provided that the final price for

gaiters should be fixed by the chief of the shoes, leather, and rubber goods branch of the Clothing and Equipage Division of the Quartermaster Corps instead of by the Price Fixing Committee of the War Industries Board. On October 9, 1918, a supplemental agreement was entered into between the United States and the claimant. This reads as follows:

"I. That the provisions of the original contract specifying the quantity of articles to be furnished and delivered are hereby modified so that henceforth the contractor shall be required to furnish and deliver and the Government shall be required to accept only the articles which are upon the date of the execution of this agreement completely manufactured in accordance with the terms of the original agreement, and in addition thereto, articles which are upon the date of this agreement in process of manufacture and the manufacture of which is completed and delivery of which is tendered within the time specified therefor in the original agreement: *Provided, however,* That the contracting officer shall have the right from time to time to determine, and his determination shall be final and binding upon the parties, whether or not the articles offered for delivery by the contractor are completely manufactured or in the course of manufacture upon the date of the execution of this agreement. This supplemental agreement is without prejudice to an adjustment of the contract price for articles manufactured under specifications No. 1322.

"II. The contractor shall not be required in the future to furnish and deliver or the Government to accept any articles provided for in the original agreement, except the articles provided for in paragraph one above.

"III. All other conditions and provisions of the original contract as heretofore modified by the first supplemental agreement shall remain in full force and effect and shall apply to this supplemental agreement as though herein written.

"IV. That any and all debts, liabilities, claims, or causes of action, if any, existing between the parties hereto, one against the other, by reason of or arising out of the aforementioned modification of the original contract, are hereby released and discharged."

3. It does not appear that any settlement has been made with the contractor in accordance with the provisions of Articles I, II, and III of the supplemental agreement of October 9, 1918.

4. The supplemental agreement of October 9, 1918, is a formally executed contract. Although the claim is filed under the act of March 2, 1919, as a class A claim, whatever rights the claimant has arise out of the provisions of the contract of October 9, 1918.

DECISION.

1. Paragraph IV of the supplemental agreement of October 9, 1918, providing for the release and discharge of all debts, liabilities, etc., is, if taken alone, inconsistent with the earlier provisions of the

agreement. It is clear, however, that the only possible construction of that agreement is that the contractor should be paid in accordance with Articles I, II, and III of the agreement. It is entitled to nothing except what may be worked out in accordance with those provisions, and Article IV of the supplemental agreement has the effect of releasing the United States from all other obligations.

2. The gaiters might have been delivered, in accordance with the contract, monthly through the year 1918. The claimant therefore could have delivered gaiters at any time during October, November, or December, 1918, and complied with the provisions of Paragraph I of the supplemental agreement. It does not appear in the record whether or not suspension of the performance of the supplemental agreement of October 9, 1918, was called for after the armistice. It is evident that the United States wanted no more four-buckle gaiters, and it may be that the contractor was justified in not finishing any more of the gaiters after November 11, 1918. In that case it would be entitled to the usual relief in respect to materials, etc., which it had acquired for the purpose of performing the contract and had on hand at the time of the suspension notice. In any case it is entitled to relief under the provisions of paragraph one of the supplemental agreement of October 9, 1918, if full payment has not already been made.

3. The claim should be treated as having arisen under G. O., No. 103.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield and Mr. Howe concurring.

Case No. 1958.

In re CLAIM OF CHAMBERSBURG HOSIERY CO.

1. **COMMITMENTS—SUBSTITUTION OF OTHER MATERIALS.**—Where claimant, under a contract for the manufacture of woolen socks, orders from a subcontractor the quantity of wool required to fill its contract, but actually uses its own existing stock instead of part of the wool which it had specially ordered, claimant is not entitled, on suspension of its contract, to payment for all the wool still undelivered by subcontractor, the proper basis of settlement being the amount of wool actually needed to fill the uncompleted portion of the contract.
2. **DATE OF FILING CLAIM.**—A claim filed September 5, 1919, is not filed in accordance with the provisions of the act of March 2, 1919.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a proxy-signed contract for the manufacture of woolen socks. Held, claimant is not entitled to relief.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, was filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$10,459.19. The claim is dated the 5th day of September, 1919, and marked "Board of Contract Adjustment. Received September 9, 1919." The claim states that an agreement was made between the claimant and the United States on the 16th day of May, 1918, for 480,000 pairs of lightweight socks under contract 3234-P.

2. The claimant entered into a formal proxy-signed contract No. 3234-P with the United States on the 16th day of May, 1918, for the manufacture of 480,000 pairs of men's lightweight wool hose to conform with specifications, at 35 cents per pair. The claimant had difficulty in obtaining woolen yarn and applied to Rufus W. Scott, knit goods branch, New York, for assistance. The knit goods branch had an option from William Whitman & Co. (Inc.), of Boston, Mass., to purchase wool yarn. The amount needed for contract 3234-P was estimated by claimant at 45,000 pounds, which was 1,000 pounds more than the schedule required. An order was issued to Whitman & Co. (Inc.) to deliver 45,000 pounds of yarn to the claimant. The claimant gave Whitman & Co. (Inc.) an order, No. 2066,

for the said 45,000 pounds of yarn, shipments to be made in July, August, September, October, and November, 1918. The said order stated: "To be used in Government contract No. 3234-P."

3. In November, 1918, the claimant was directed by the Government to suspend production. It had manufactured and delivered 384,000 pairs. The balance of said order, amounting to 96,000 pairs, was not manufactured. The claimant states it had on hand and on commitment 18,907 pounds of yarn. Only 8,800 pounds of yarn were necessary for the completion of the 96,000 pairs at the scheduled requirement of 1.1 pounds of yarn to the dozen pairs. A settlement was made with the claimant under the said contract, under which the claimant was allowed:

For 8,800 pounds of yarn-----	\$20,757.98
Less allowance yarn retained by claimant-----	12,454.79
<hr/>	
Making a balance of-----	8,303.19
Paid on the 96,000 pairs of socks at 2½ cents-----	2,400.00
For freight, handling, and special facilities-----	99.00
<hr/>	
Total balance paid the claimant-----	10,802.19

An award was made the claimant for the said balance and payment made thereon.

4. On May 20, 1919, the claimant wrote the Claims Board, Director of Purchase, in part, as follows:

"As per your letter of the 8th, we are enclosing herewith four copies from claims and settlement on contract No. 3234P, duly signed by treasurer of our concern, sworn to before a notary, with the corporate seal attached.

"You will note that the amount of our claim already submitted to the War Department, Philadelphia, Captain W. G. Wilkinson, is \$10,802.19. We claimed more than this because of an extra amount of 50% single 30's wool yarn, but it appears that our request will not be granted."

On December 22, 1919, the claimant wrote this Board:

"Whitman & Co. shipped us, against yarn contract, 31,767 pounds, leaving a balance of 13,233 pounds to ship us."

The claimant apparently claims an additional allowance for the depreciation on the said 13,233, less the sum of \$3,646.01 which it elects to allow Whitman & Co., out of the sum received in settlement of its contract 3234-P.

DECISION.

1. Under contract 3234-P the claimant required 44,000 pounds of yarn at the scheduled rate of 1.1 pounds per dozen pairs. It purchased 45,000 pounds of yarn for said contract from Whitman &

Co., which was 1,000 more than was required under the schedule. It states it received only 31,767 pounds from Whitman & Co. Manifestly, then, it must have supplied a part of the yarn used from its own stock. In its settlement under contract 3234-P it received an allowance for 8,800 pounds, the balance required over and above the amount used on goods completed. It can not now claim for some part of the yarn ordered, which it unnecessarily used from its own stock.

2. No agreement was made with the claimant for said yarn under which it can claim apart from contract 3234-P. It has been paid in full for its claim under said contract.

3. The claim is denied. We need not decide whether it should be denied as a claim under the act of March 2, 1919, because it was presented to this board on or after September 5, 1919, and not before June 30, 1919, as required by the act, or whether the letter of March 30, 1919, shows a proper presentation.

Col. Delafield and Mr. Harding concurring.

Cases Nos. 1984-568.

In re CLAIM OF THE SELDEN BRECK CONSTRUCTION CO.

1. **WRITTEN CONTRACT—CHANGE IN PLANS AND SPECIFICATIONS—RIGHTS OF CONTRACTOR.**—Where claimant had a written contract to construct upon a cost-plus basis a one-unit two-squadron training school complete, in accordance with certain plans and specifications which were made a part of the contract, and which contract set out a scale of percentages and amounts to be paid claimant for such work, based upon the cost thereof, but fixed the maximum fee at \$70,000, the provision in the contract which authorized the contracting officer to make changes in the plans and specifications and to call for additional work gave to the contracting officer the right to call merely for such changes in the plans and specifications and for such additional work as was necessary and incidental to the completion of the work in accordance with the general plan.
2. **ADDITIONAL WORK — COMPENSATION — HOW DETERMINED.**—Where claimant, during the time of the performance of said contract, at the request of the contracting officer, performed additional work, which the contracting officer had no right to call for under the terms of the written contract, the understanding being that he was to be paid therefor in accordance with the scale set out in the original contract, there arose under the circumstances of the case an implied agreement upon the part of the United States, within the purview of the act of March 2, 1919, to pay claimant a fee for such additional work, to be determined by the scale of fees and percentages and other provisions modifying the same identical with such scale and provisions contained in the written contract, based upon the total cost of all work done, which fee should be ascertained by adding the cost of the work done under the written contract to the cost of the additional work and applying this total to the appropriate percentage found in such schedule, subject to any other provision identical with those contained in the written contract modifying such percentage.
3. **CLAIM AND DECISION.**—This claim is filed upon the theory that claimant is entitled, under the act of March 2, 1919, to compensation in excess of the maximum fee provided for in its original contract, where the contracting officer directed and instructed claimant to do certain work in addition to that called for in the original contract. Held, that claimant was directed to do additional work that it was not required to do under its original contract, and that there arose under the circumstances of the case an implied agreement on the part of the United States Government, within the purview of the act of March 2, 1919, to pay claimant for such additional work.

Mr. Williams writing the opinion of the Board.

FINDING OF FACTS.

The case arises under the act of March 2, 1919. The claim here presented is for \$37,472.51, which is the aggregate amount of claims Nos. ASA No. 233 and ASA No. 568 of the Air Service Claims

Board forwarded to this Board for determination. These claims will be consolidated and treated here as one case as if a statement of claim, Form B, had been filed covering the aggregate amount claimed. This case grows out of the following facts and circumstances:

1. Under date of July 28, 1917, the petitioner, the Selden Breck Construction Co., entered into a formal contract with the United States (by C. G. Edgar, captain, Signal Corps, United States Reserves, contracting officer) by which, among other things, it was provided as follows (the typewritten portions of the printed contract appearing in italics):

ARTICLE I.

"EXTENT OF THE WORK.—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

"(a) *For the construction of a one-unit, two-squadron training school complete at Fort Sill, Oklahoma, including the construction of buildings, preparation of fields, installation of water, sewer, and lighting systems, and building of necessary roads and railways, all as per plans and specifications furnished by contracting officer, in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction.*

"The contracting officer may, from time to time, by written instructions or drawings issued to the contractor, make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings.

* * * * *

ARTICLE III.

"DETERMINATION OF FEE.—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

"If the cost of the work is under \$100,000.00 a fee of ten per cent (10%) of such cost.

"If the cost of the work is over \$100,000.00 and under \$125,000.00 a fee of \$10,000.00.

"If the cost of the work is over \$125,000.00 and under \$250,000.00 a fee of eight per cent (8%) of such cost.

"If the cost of the work is over \$250,000.00 and under \$266,666.67 a fee of \$20,000.00.

"If the cost of the work is over \$266,666.67 and under \$500,000.00 a fee of seven and one-half per cent ($7\frac{1}{2}\%$) of such cost.

"If the cost of the work is over \$500,000.00 and under \$535,714.29 a fee of \$37,500.00.

"If the cost of the work is over \$535,714.29 and under \$3,000,000.00 a fee of seven per cent (7%) of such cost.

"If the cost of the work is over \$3,000,000.00 and under \$3,500,000.00 a fee of \$210,000.00.

"If the cost of the work is over \$3,500,000.00 a fee of six per cent (6%) of such cost.

"Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (b) above, shall in each of the above contingencies be five per cent (5%) and no more of the amount of such part of the cost.

The cost of materials purchased or furnished by the contracting officer for said work, exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the contractor, but for no other purpose.

The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the contracting officer may determine.

The total fee to the contractor hereunder shall in no event exceed the sum of \$70,000.00, anything in this agreement to the contrary notwithstanding.

2. In addition to the above-quoted provisions, the written contract also contains detailed provisions in respect to the "Cost of the work," "Payments," "Inspection and audit," and "Special requirements," and other detailed provisions which, if not absolutely essential, are reasonably necessary provisions to govern the rights and conduct of the parties in the performance of work of the nature and character of that contemplated under the cost-plus system of construction adopted by the Government in respect to the work of the sort contemplated and carried on.

3. In due time the petitioner began upon the work under the written contract, and when this work was well on the way to completion, increased knowledge and experience on the part of the officers in charge of the construction and development of the aviation fields developed the necessity not only of enlarging such fields by the addition of additional buildings and equipment over and above that originally contemplated at the time the contract was made, but experience in matters of policy demonstrated that at the particular site at which the work under the contract in this case was to be done gave occasion for the construction of other and additional units in connection with the development of the Air Service. So that before petitioner had completed the work contemplated and embraced in the written contract, the following work is alleged to have been done by the petitioner with the same force and organization performing the work under the original contract, which work

it is alleged, was done under orders received from the construction division of the Signal Corps, and which, it is also alleged, was new and additional work not contemplated or embraced under the terms of the written contract:

- " 1 photographic laboratory;
- " 2 bachelor officers' quarters;
- " 5 mess halls;
- " 5 barracks;
- " 4 steel aero hangars, involving also the extension of rock-bound asphaltum roads (with heavy fill), extension of electric pole line, sewer, and water lines;
- " 1 steel aero repair shop, together with rock-bound asphaltum roads and extension of water and sewer lines in connection therewith;
- " 1 hospital addition;
- " 1 nurses' quarters;
- " 1 hospital barracks for personnel, together with extension of rock-bound asphaltum roads, water, sewer, and pole lines;
- " 1 pumping station, including installation of pumps and machinery and steel water tank and tower, as well as extension and enlargement of water-supply mains, with all necessary valves, cut-offs, and fittings, and also independent power line from transmission station to relieve the load occasioned by this addition;
- " 1 septic tank addition, sludge pit, chlorinator chamber, with necessary 20' excavation for new sewer line, with necessary fill to form grade and extending pole line;
- " 1 radio and artillery buildings, less amount allowed for addition to hangar, with necessary roads, sewer, and pole line;
- " 1 oil reclamation building, together with necessary additional roads, sewer, and pole lines;
- " 1 reclamation warehouse, together with additional roads and pole line;
- " 1 medical research building;
- " 4 hose houses;
- " 1 morgue;
- " 1 gasoline storage tank addition;
- " 1 quartermaster storehouse;
- " Additions to 7 barracks;
- " Additions to 7 mess halls;
- " 2 temporary flying-field offices;
- " 1 permanent flying-field office;
- " Addition to officers' club;
- " Addition to post exchange building;
- " Addition to guard house;
- " Addition to fire engine hose house;
- " 3 water fillers;
- " Unloading steel for school building and reloading for shipment to Los Angeles;
- " 1,554 wood lockers for 7 barracks;
- " Repairing all roofs with elastium of all buildings erected under the written contract;
- " Moving two temporary mess halls and remodeling for use as garage;
- " 22 portable garage stands;

- " 22 coal and wood boxes;
- " 16 additional ventilators in hospital;
- " 130 flood lights;
- " 300 doors D 2A 1 lt. changed to 4 lt.;
- " 280 shades for hospital and photo building;
- " 280 screens for hospital and photo building;
- " 6 trusses to carry overhead steam lines; and
- " 120 wood ventilators on buildings below joist."

4. There was no express agreement or understanding between the officers of the Construction Division of the Signal Corps and the petitioner with respect to the method of the *execution* of this new and additional work, but the work was done under the direction and supervision of the Government construction officer on the job and was handled in all respects by the Construction Division and by the contractor in the same manner as work done under all the terms, conditions, and restrictions mentioned in the written contract of July 28, 1917; nor was there any express understanding or agreement between the officers of the Construction Division of the Signal Corps and the petitioner as to the amount of the fee to be charged for the alleged new and additional work, but the conduct both of the petitioner and of the Government officers ordering the new and additional work very clearly indicate that with respect to the matter of fee also the new and additional work was regarded as a part and parcel of the total work to be done at the post field, Fort Sill, Okla., the fee for all of which was to be determined and fixed according to the sliding scale of amounts and percentages for the determination of fee and other provisions with respect to the determination of fee mentioned and embraced in the written contract of July 28, 1917.

5. Under date of January 12, 1918, petitioner and the United States (by Col. C. G. Edgar, Signal Corps, contracting officer) entered into a so-called "supplemental contract," which recited the contract of July, 1917, and further recited that—

"Whereas paragraph two, Article I, of the aforesaid contract of July 28, 1917, provided that the contracting officer could from time to time make changes in the drawings and specifications, issue additional instructions, require additional work to be done, or direct the omission of work previously ordered, all of which changes, modifications, and additions should be covered by the provisions of the aforesaid contract the same as if they were embodied in the original drawings and specifications; and

"Whereas the contracting officer in the aforesaid contract, or his successor, has issued written instructions and drawings to the contractor requiring certain alterations in the plans and specifications for said buildings, which alterations have increased the cost of such construction work to the extent of approximately one hundred sixty-four thousand eight hundred eighty dollars (\$164,880.00); and

"Whereas it is provided in the last paragraph of Article III of the aforesaid contract of July 28th, 1917, that the total fee of the

contractor thereunder shall, in no event, exceed the sum of seventy thousand dollars (\$70,000.00), anything in said agreement to the contrary notwithstanding; and

"Whereas in view of the aforesaid alterations which have increased the cost of the said construction work, it is the desire of the parties to increase the aforesaid maximum total fee which can be paid to said contractor under said agreement from the sum of seventy thousand dollars (\$70,000.00) to the sum of eighty-four thousand dollars (\$84,000.00).

"Now, therefore, this contract witnesseth, That in consideration of the premises and of the covenants and conditions hereinafter set forth, the contractor and the contracting officer hereby covenant and agree as follows:

"ARTICLE I.

"It is hereby mutually agreed by and between the parties hereto that the last paragraph of Article III of the aforesaid contract of July 28th, 1917, shall be amended to read as follows: 'The total fee to the contractor hereunder shall, in no event, exceed the sum of eighty-four thousand dollars (\$84,000.00).'

"ARTICLE II.

"The parties hereunto mutually covenant and agree that this contract shall be supplemental to the aforesaid contract of July 28th, 1917, to the same extent as if the above amendment had been specifically written into said contract when originally made, but that otherwise all covenants, agreements, terms, and conditions thereof shall be in full force and effect."

6. The so-called "supplemental contract" contains also other appropriate provisions which are not necessary to set out here.

DECISION.

A. Was the work mentioned in paragraph 3 of the statement of facts hereunto attached work which the contracting officer had a right to require under the terms of the contract of July 28, 1917?

1. The contract of July 28, 1917, between petitioner and the Government of the United States is not before this Board for the determination of any of the rights of the parties thereunder, but that contract is here presented merely in an incidental way for the purpose of determining whether or not the alleged additional work done by the contractor at the post field, Fort Sill, Okla., was such work as the contracting officer had a right to require under the terms of that contract. The contract of July 28, 1917, called only for the work mentioned in the plans and specifications which had already been drawn up by Mr. Albert Kahn, of Detroit, and were made a part of the contract. This contract and these plans and specifications called for the following layout of buildings and work only:

"For the construction of a one-unit, two-squadron training school complete at Fort Sill, Oklahoma, including the construction of build-

ings, preparation of fields, installation of water, sewer, and lighting systems, and building of necessary roads and railways, all as per plans and specifications furnished by contracting officer."

This contract also contains the provision that—

"The contracting officer may from time to time, by written instructions or drawings issued to the contractor, *make changes in said drawings and specifications*, issue additional instructions, *require additional work*, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications."

The question then presented is: To what extent could the contracting officer, under the terms of the written contract, *make changes in the drawings and specifications*, or *require additional work*?

2. In this case it is true that the Government was paying all costs of labor and materials, and the only interest that petitioner had in the work was the fee which it was to receive, based in the main upon a sliding scale of allowances and percentages to be determined by the cost of the work, but subject to a clause limiting the amount of possible fee to \$70,000, irrespective of the cost of the work that could be called for under the written contract. The original contract was made upon estimates of the cost of the work, and the presumption must be indulged that petitioner agreed to the insertion of the clause limiting the possible fee after consideration of the question as to whether or not the work contemplated under the contract would approach near enough to the estimated cost to allow reasonable compensation for the work undertaken. In these circumstances this Board is of the opinion that, with respect to the right of the contracting officer to call for changes in plans and specifications, and for additional work, the situation of the petitioner was analogous to that of an independent contractor under a contract in which he was to furnish and pay for the labor and materials and receive a unit price for the completed work. In respect to the latter cases the law is well settled that, where plans and specifications are specifically made a part of the original contract for construction work and there is a provision authorizing the party having the work done to call for changes in the plans and specifications, such party has a right to call only for such changes as may be necessary and incidental to the completion of the work in accordance with the general plan (4 Elliott on Contracts, sec. 3675; 9 Corpus Juris, 718-722; *C., C., & St. L. Ry. v. Moore*, 82 N. E. (Ind.), 52). This doctrine, having its foundation in common sense and right, may be applied with equal force to the provision in the contract which authorizes the contracting officer to call for additional work.

The plans for Government construction work were not drawn up in the first instance to conform to particular fields, but they were general plans to be adopted and used in the construction of units of various sorts throughout the United States. There were, therefore, differences of contour which had to be accounted for in the actual work to be done in pursuance of these plans depending upon the situation of the field. It is clear that the provision giving the contracting officer the right to call for additional work was intended only to embrace such incidental and necessary work as might be found essential to the completion of the work in accordance with the general plan. The fee in these cases was based upon an estimated cost of the work mentioned and contemplated under the written contract, and any construction of the written contract which would authorize the contracting officer to call for new work or additional work involving a radical departure from the plans and specifications which were made a part of the agreement, would involve an additional undertaking beyond that contemplated by either party at the time of the execution of the written agreement.

B. How must the above principle be applied to the facts and allegations of this case?

3. It is very clear, in applying the general principle and common-sense rule above announced, and in construing the provisions of the written contract governing the parties in the execution of all work at the post field, that the contracting officer had no right under the terms of the written contract to call for additional buildings; or substantial additions to buildings already completed or partially completed by the petitioner in accordance with the original plans and specifications; or the conversion or rebuilding of any buildings which were completed or partially completed according to the plans and specifications where such rebuilding or conversion was not occasioned by the fault of the contractor; or the building, erection or construction, of necessary electrical equipment, railroads, roads, waterways, sewers, or fencing, occasioned by the erection of such additional buildings not embraced in the plans and specifications under the original contract, or the rebuilding or conversion of buildings completed or partially completed according to the plans and specifications where such rebuilding or conversion was not occasioned by the fault of the contractor; nor for the maintenance of buildings already constructed under the terms of the written contract or under any agreement independent of the written contract; where such additional work embraces additional cost not to be compensated for under any provision of the written contract.

C. The contract for the additional work; its terms.

4. In respect to all additional work, which the contracting officer had no right to call for under the terms of the written contract of

July 28, 1917, as hereinbefore limited and defined, which was done by the petitioner at the post field, upon orders received from the Construction Division of the Signal Corps, or which was accepted on behalf of the United States, there was a contract entered into and implied from the facts and circumstances of the case between the petitioner and the Government of the United States, which contract comes within the purview of the act of March 2, 1919. It is apparent that it was understood between the parties that, in the execution of such additional work, the rights of the petitioner and the Government should be determined by provisions identical with those contained in the written contract of July 28, 1917; and it is apparent also that it was understood by the parties that the fee to be allowed for the additional work was to be ascertained by applying provisions identical with the scale of percentages and allowances contained in the contract of July 28, 1917, for the total work done at the post field, but not as to such additional work subject to any clause limiting the possible fee; so that, in ascertaining any fee to be allowed for the additional work (the contractor being settled with for work done under the original contract and strictly in conformity with the terms thereof), the cost of such additional work should be added to the cost of the work done under the original contract and the appropriate percentage ascertained by this total from the schedule of percentages and this percentage applied to the cost of the additional work, subject to any other provisions of the contract with respect to the modification of such percentage. There were two reasons, according to Col. Bennington, why it was the intention of the Government officers that the fee for the additional work should be ascertained in this manner:

“(a) That to regard the additional work as an entirely separate and distinct undertaking would involve dropping down again to the bottom of the scale of allowances and percentages, thereby giving larger fees to the contractor, whereas this was not contemplated by the parties, because the larger allowance or percentage of fees, as related to smaller cost of the work, was occasioned in large part by the fact that the beginning of the work involved the initial assemblage of the contractor's organization; and

“(b) That the original work and the additional work were, in many instances, carried on simultaneously, and there was a mixture of materials and an interchange of labor between the two jobs which made it practically impossible to separate the costs of the two jobs in order to ascertain the separate fees due therefor.”

So far as this case is concerned, there is no difficulty in applying the graduated scale of allowances and percentages and other provisions of the agreement to the ascertainment of the fee for the additional work, and this Board will therefore give expression, in the manner above set out, in the ascertainment of the fee for the addi-

tional work, to the undisputed intention of the parties in regard to that matter.

D. The so-called "supplemental contract" not effective or binding between the parties.

5. This so-called "supplemental contract" was entered into after a portion of the additional work was completed, and was merely an effort on the part of the Government to make payment of a portion of the fee for the additional work. It recites, however, that the additional work for which the additional fee in the supplemental contract is to be paid was such work as the contracting officer had a right to call for under the terms of the original contract. If the contracting officer had a right to call for such additional work under the terms of the written contract of July 28, 1917, then the supplemental contract is null, void, and of no effect, because it is an agreement allowing the petitioner a fee over and above that which is allowed by the limiting clause in the original contract. If the work mentioned in said supplemental contract is work which the contracting officer had no right to call for under the contract of July 28, 1917, then this supplemental contract is not an instrument upon which petitioner might rely for recovery. This supplemental contract, therefore, must be set aside as having no binding effect upon the parties thereto, and the rights of the parties must be determined in accordance with the conclusions herein announced as if no such supplemental contract had been entered into.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Shaw concurring.

Case No. 178.

In re CLAIM OF FRANK L. YOUNG CO.

1. **CONTROLLED INDUSTRY.**—Where claimant was ordered by the War Industries Board and by the Quartermaster General not to dispose of a certain article, which claimant owned, for the reason that the Government intended to commandeer the same, and claimant complied with said order, there resulted an implied contract within the act of March 2, 1919, by which the Government was bound to compensate claimant for losses sustained by obeying said order.
2. **CLAIM AND DECISION.**—Claim is for \$15,756.59 under the act of March 2, 1919, made on Form B, for losses sustained by holding wool grease in compliance with Government order. Held, that claimant is entitled to relief.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$11,274.79 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. At the time of the hearing before the Board the claimant amended its claim by adding the following items:

Storage 4 months @ 12¢ per bbl. per month, Sept. 16, 1918, to Jan. 16, 1919.....	\$171. 36
Insurance @ 1% per year, 4 mos.....	98. 66
Interest on capital 4 months.....	592. 14
Labor and cooperage 20¢ per bbl.....	71. 40
Interest on claim from January 16, 1919, to January 3, 1920.....	648. 24
Total	1, 581. 80
10% profit on goods held but not taken by Government.....	2, 900. 00
	<hr/> 4, 481. 80

3. The claimant had been engaged for many years in dealing in wool grease and was one of the largest concerns in the country that handled this article. On September 16, 1918, it had purchased and paid for and had in its warerooms about 500 barrels of wool grease. On September 17, 1918, it received the following telegram:

GOVT., WASHINGTON, D. C., *Sept. 16, 1918.*

FRANK L. YOUNG CO.,
Boston, Mass.:

The War Industries Board is taking control of the wool grease production of the country and will announce its plan on or shortly

prior to October first. Pending this announcement you are instructed to make no deliveries or sales without approval by the oil, fats, and waxes section of the War Industries Board. During this period no deliveries will be approved unless urgent necessity is shown.

E. J. HALEY,
War Industries Board.

Mr. Haley was a member of the War Industries Board and chairman of the oil, fats, and waxes section.

4. Mr. Frank L. Young, treasurer of the claimant company, came to Washington shortly after the receipt of this telegram and saw Mr. Haley, of the War Industries Board. He stated to Mr. Haley that the claimant had a large amount of wool grease on hand, and that the demands for it from its customers were very large. Mr. Haley suggested to Mr. Young that he see Gen. G. W. Goethals. Mr. Young did so, and Gen. Goethals informed him that the needs of the Government for wool grease were greatly in excess of the available supply, and that it was his intention to commandeer the entire supply of the claimant for the use of the Government, and that sales of the grease without permission would not be permitted.

5. The claimant received many orders from private concerns in this country and elsewhere for wool grease and made frequent requests on Mr. Haley for permission to fill the orders. In a few cases the claimant was allowed to sell the grease to private users, but in many cases permission to sell was denied. On October 29, 1918, the following telegram was sent to the claimant by Mr. Haley:

WASHINGTON, D. C., *Oct. 29, 1918.*

F. L. YOUNG Co.,
Boston, Mass.:

Referring to our telegram Sept. seventeenth, you are permitted to dispose of stock of wool grease purchased prior to Sept. seventeenth without releases from this board.

E. J. HALEY,
War Industries Board.

Between September 16, 1918, and October 29, 1918, the claimant had been permitted to sell enough wool grease so that the amount which it had left on October 29 was 357 barrels.

6. The wool grease was used as a "dubbing" or waterproofing for shoes and also as one of the components for a salve to be spread over the exposed portions of a soldier's body to prevent burning by gas.

7. After the receipt of the telegram of October 29, 1918, the claimant sold the wool grease from time to time for the best prices obtainable. If the claimant had been allowed to sell the grease between September 16 and October 29, 1918, the entire amount which it had on hand could have been sold at a profit. The market price during

that period was in excess of the cost. After October 29, 1918, the market price of the grease declined rapidly, and it is for the loss which the claimant suffered by reason of the shrinkage in value of the grease that the claim is made.

DECISION.

1. The action of the War Industries Board, as shown by its telegram to the claimant of September 16, 1918, was within the scope of its duties, and places the Government under obligations to reimburse the claimant for such losses as it suffered by reason of its compliance with the orders of the Government. The action of the War Industries Board was reenforced by the statements of Gen. Goethals to the claimant, and there is no doubt that the control of the wool grease was for War Department purposes. The result is that an implied agreement was entered into on September 16, 1918, by the terms of which the claimant was obliged to hold its supply of wool grease from the market except in such cases as it had explicit permission to make sales, and the United States is responsible for the claimant's losses, which are to be measured by the shrinkage in value of the wool grease after the claimant was given permission on October 29, 1918, to sell to the trade, and for such losses as were suffered by the claimant on sales made within a reasonable time after that date.

2. In determining the claimant's losses there should also be considered the necessary and unavoidable expenses that were incurred by the claimant in being obliged to hold its wool grease off the market, and the fact that the claimant had 357 barrels of wool grease occupying space in its storerooms for a considerable period before they could be sold, and the fact that it has paid insurance premiums on the grease, and that its overhead expenses continued during the time it was prevented from transacting its ordinary business between September 16, 1918, and October 29, 1918, should all be borne in mind.

DISPOSITION.

This Board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Lieut. Col. Junkin concurring.

Case No. 268.

In re CLAIM OF SIEGAL & SIEGAL.

1. **RE-FORMATION OF WRITTEN CONTRACT.**—Where through mutual mistake a written contract failed to include terms which both parties intended it to contain, the Secretary of War has the power to re-form the contract, the power to re-form an instrument being a part of the original power to execute it.
2. **MISTAKE IN PATTERNS.**—Where under a partially completed clothing contract the Government furnished claimant a wrong set of patterns and then ordered claimant to work over the garments so as to make them right, thereby causing claimant extra work, there is an implied promise to pay the reasonable expense of the extra work.
3. **SUPPLEMENTAL AGREEMENT—JURISDICTION.**—Where, under such circumstances, a supplemental agreement is executed partly in order to reduce this implied obligation on the part of the Government to express terms, but through mutual mistake the instrument does not accomplish this purpose, but on the contrary releases the Government from all claims, this Board, although without jurisdiction under the act of March 2, 1919, to consider the claim as an implied agreement, has jurisdiction under General Order 103 to re-form the supplemental agreement by means of another supplemental agreement.
4. **CLAIM AND DECISION.**—Claim originally filed under the act of March 2, 1919, but later referred to this Board under General Order 103, arising out of a written contract for the manufacture of woolen service coats. Held, claimant is entitled to re-formation of its supplemental contract.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. In 1918 the claimants entered into contract No. 5513-N with the Government, through the Quartermaster Corps, Clothing and Equipment Division, for the manufacture of wool service coats.

2. On August 24, 1918, the claimants were furnished by the New York depot quartermaster with certain flap patterns, which they proceeded to use. After about 9,000 coats had been cut with the use of these patterns, it was discovered that the patterns were wrong and that the top flaps were much too large for the pockets and the lower flaps were too small. Thereupon, about the 16th day of October, 1918, the claimants were instructed to cut down and remake the large flaps and to reduce the size of the lower pockets. This necessitated considerable extra work by the claimants, the expense of which appears to have been \$2,335.50.

3. Under date of October 25, 1918, the claimants wrote to Capt. Malachi Sheahan requesting compensation for the expense to which they had been put by the mistake of the Patterns Division.

4. On November 30, 1918, the claimants wrote to Mr. Guyer, supervisor of the Clothing and Equipage Division, making a similar request for compensation.

5. It appears from a memorandum dated December 18, 1918, addressed to the Clothing and Equipage Division, Board of Review, and signed by the Clothing and Equipage Division, inspection branch, Stuart Louchheim, captain, Quartermaster Corps, and by a letter of February 24, 1919, signed by the same officer, that the claimants' claim was examined and found to be just and proper for the amount claimed.

6. It appears by affidavit of Capt. Malachi Sheahan, dated September 22, 1919, that on January 21, 1919, Capt. Sheahan was assigned to the Board of Contract Adjustment, Clothing and Equipage Division, New York, and took up with the claimants the question of termination of their contract No. 5513-N. It appearing that they had a just claim for \$2,335.50 on account of error referred to, Capt. Sheahan allowed the claimants that amount, to be included in their settlement, and reported to the Board just referred to his approval of the item. It further appears from his statement that, through an error of an officer of the Government, the item in question was not included in the supplemental agreement terminating contract No. 5513-N which was then prepared and which was executed by the claimants and by the Government officials.

7. The supplemental agreement provided for payment by the Government of a certain sum not including the amount now claimed, and contained a release in full of all claims by the claimants.

8. The provisions of the agreement relating to payment and to the release were as follows:

"The United States shall pay forthwith to the contractor the sum of \$1,755 66/100 which sum, together with payment for the finished articles, for work heretofore delivered to the United States and not yet paid for, shall constitute full and final compensation for articles or work delivered, services rendered and expenditures incurred by the contractor under the original contract."

The contractor agreed to—

"release, remise, and forever discharge the United States from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever, due or to become due, in law or in equity, under or by reason of, or arising out of said original contract. Upon receipt of the amount therein agreed to be paid, the contractor shall execute and deliver to the United States such further or additional instruments of receipt or release as the United States shall demand."

9. The claim comes before the Board in several different ways.

10. The claimants' original claim was made by letter, as already stated, on October 25, 1918, and was renewed on November 30, 1918, and December 9, 1918.

11. Under date of June 28, 1919, the claimants made claim for relief under the act of March 2, 1919, by petition filed with the Claims Board, Office of the Director of Purchase. This petition was stamped "Received by James O. Tripp, date 30th day of June, 1919, as of 28th."

12. Under date of April 29, 1919, the claimants filed a claim on Form B alleging their claim to be upon an informal contract with the Government for repairing wool service coats. This petition was received by this Board on May 5, 1919.

13. On August 1, 1919, the whole matter was referred to this Board by the War Department Claims Board, under General Order 103.

DECISION.

1. The gist of the matter appears to be that, in the course of performance of a contract which the claimants had with the Government, the claimants were furnished with a wrong set of patterns, due to an error of a Government official. The claimants were then ordered to work over the garments so as to make them right. This caused extra work by and expense upon the claimants. Under such circumstances a promise is implied on the part of the Government to pay the reasonable expense of the work. The claimant's rights were similar to those of a contractor with an individual to recover for extras ordered outside of the terms of his written contract. (See *In re Henry S. Blewett & Sons*, 1, Bd. Cont. Adj., p. 97.)

2. There is an impediment, however, to the claimants' recovery upon this implied promise in the fact that the supplemental terminating agreement, executed subsequently to the accrual of the claimants' rights, contained a release in full to the Government of all debts and demands whatsoever, under or by reason of, or arising out of said original contract. This release is broad enough to cover any claim the claimants might have by reason of the work in question.

3. A general release of the kind executed by the contractor is intended to cover all liabilities and to form a final winding up of the relations between the parties. Such a release is not lightly to be construed to require payments not specifically set forth therein or to except liabilities not clearly excluded by its express terms.

4. It appears, however, in the present case, from the statements of the claimants and from the affidavit of the officer representing the United States in the termination proceedings, Capt. Malachi Sheahan, that at the time of the execution of the cancellation agreement it was intended by both parties that a part of the terms of the

agreement should be the inclusion of the payment to the claimants of this sum, \$2,335.50, to settle their claim for extra work.

5. Where a written contract by error or mistake fails to include terms which both parties intended to have made a part of it, or includes terms such as neither party expected to be part of it, a court of equity has jurisdiction to reform the instrument so that it shall state the real intention of the parties executing it. (*Aetna Construction Co. v. United States*, 46 Ct. of Cls., 113, and cases cited.) A court will not, however, reform the written contract of the parties except where evidence of the necessary facts appears clear and unmistakable. (*U. S. v. Milliken*, 202 U. S., 168.)

6. The question of the power of an equity court to re-form an instrument and of the power of a department of the Government to re-form its own contract are not quite the same. We believe, however, that it would be too narrow a construction of the powers of the War Department to hold that the Secretary of War could not take action to put into correct form a contract which was made through one of the departments under his control. We consider the power to re-form an instrument a part of the original power to execute it. In other words, the power to enter into a contract includes the power to draft the contract in correct form and to join in correcting the draft, even after execution, if errors have crept into it. (See Op. of J. A. G. 165, dated Sept. 27, 1918.)

7. We find the facts in this case entitle the claimants to a re-formation of the termination agreement.

8. This is not a class B claim, because the claimants' right to compensation for extra work and labor was merged in the cancellation agreement. The claim comes properly before this Board under General Order 103, War Department, 1918, as already stated.

9. This case has once before been before this Board. Under date of March 29, 1919, the Board advised the Director of Finance, War Department, Purchase, Storage and Traffic Division, that the circumstances warranted a re-formation of the claimant's termination contract so as to permit the payment of the sum claimed. This apparently has not been done.

10. The cancellation agreement should be re-formed by a supplemental agreement so as to include the payment to the claimants of \$2,335.50.

DISPOSITION.

1. This Board will draw a supplemental contract amending the termination contract in accordance with this decision, and transmit the same to the Claims Board, Director of Purchase, for appropriate action and payment.

Col. Delafield, Mr. Williams, and Mr. Wise concurring.

Case No. 555.

In re CLAIM OF B. F. MOORE & CO.

1. **AWARD CONSTITUTES AGREEMENT.**—Where claimant was notified of an award of a contract, there was an agreement within the terms of the act of March 2, 1919, even though claimant was notified to suspend operations before actually receiving the contract.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for hauling, storing, etc., in connection with an agreement for the manufacture of denim trousers. Held, claimant is entitled to relief.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board, Office of the Director of Purchase, denying a claim for \$589.86 under an alleged agreement made on or about November 6, 1918, between the claimant and Lieut. A. A. Lucey, of the Quartermaster Corps, Boston, Mass., on the ground that no agreement was made.

2. On October 15, 1918, R. S. Ely, secretary of the War Service Committee of Garment Industry, wrote the claimant that the said committee had recommended that claimant be awarded a contract for 12,000 denim trousers, first deliveries to be made November 16, 1918, and the contract to be completed within four weeks from that date, and stated that the claimant would be advised within 10 days if the recommendation had been accepted. The price was to be 38 cents per pair.

3. On November 6, 1918, the claimant received a letter from Lieut. A. A. Lucey, Quartermaster Corps, Boston, Mass., which reads as follows:

“This office is in receipt of contract papers with reference to contract 7419-B, which has recently been awarded to you for manufacturing and delivering approximately 12,000 pairs denim trousers at \$.38 per pair.

“Before the contract papers can be forwarded to you for execution it is necessary that you inform us as to whether you are a corporation or a partnership.”

4. On November 7, 1918, the claimant received 26,570 yards of Government-owned denim and on November 25, 1918, a further 5,047 yards, a total of 33 bales, weighing 1,604 pounds. The claimant carted

the said denim from the freight depot to its establishment and stored the said goods there. Later on December 17, 1918, it again carted the goods to the freight depot and reshipped them to the Boston depot quartermaster at the Government's request.

5. On November 15, 1918, the claimant received the following telegram:

"Suspend operations immediately on all contracts on which no work has yet been done and hold up until further information."
(Signed Yates, Inspector.)

The claimant made three pairs of sample trousers and shipped them to the zone supply officer, Cambridge, Mass., and was paid the sum of \$1.14 therefor, reserving in writing its right to claim under its agreement for the remaining 11,997 pairs.

DECISION.

1. The letter of November 6, 1918, to the claimant states that it had been awarded contract 7419-B for the manufacture of 12,000 pairs trousers at 38 cents per pair. Although the written contract had not then been executed by the claimant, nevertheless, the minds of the parties had met on the agreement that the claimant was to manufacture and deliver the said trousers at the said price. Moreover, on November 7, 1918, it had received a large quantity of Government-owned denim and had carted it to its factory. Thus an agreement arose between the claimant and the United States within the provisions of the act of March 2, 1919.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 1225.

In re **CLAIM OF H. A. WATSON & CO. (INC.).**

- 1. GOVERNMENT INTERFERENCE WITH CONTRACT.**—Where A cancels his contracts for the purchase of tungsten ore because of priority orders on A issued by the Government, and because of the cancellation of purchase orders from A by C, upon whom the Government had also issued priority orders, the result of which was to leave A overstocked with the class of ore he had agreed to purchase from B, there can be no recovery of damages from the Government by B, where there is no evidence of any agreement with the Government on which an obligation to pay the loss suffered by B can be predicated.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for damages arising from the cancellation by the buyer of its contract to purchase ore of claimant because priority orders issued by the Government leaves the purchaser overstocked with ore.

Mr. Hunt writing the opinion of the Board.

FINDINGS OF FACT.

This is a statement of claim, Form A, filed originally with this Board. The claimant seeks to recover its loss on a certain contract entered into with the Tungsten Products Co., of Maryland, for the sale to that company of ore, which contract the Maryland company canceled. It is alleged that this cancellation was brought about by reason of a priority order issued by the War Industries Board on the Maryland company requiring it to deliver tungsten products to the Midvale Steel & Ordnance Co., which company was under contract with the United States.

It appears that the Tungsten Products Co., of Maryland, also had contracts with the American Metals Co. and that the American Metals Co. had canceled its contracts with the Maryland company for the reason that this priority order delayed the receipt of the Maryland company's product by the American Metals Co. to such an extent that such delay amounted to a breach of the contract. The consequence of this cancellation by the American Metals Co. was to leave on the hands of the Maryland company such an amount of basic ore that the basic ore contracted for by the Maryland company with this company was no longer needed.

DECISION.

No evidence has been submitted by the claimant, nor is any believed to exist, of any agreement made by any person acting under the authority of the Secretary of War or the President on which can be predicated any obligation to pay the loss suffered by the claimant.

Damages to persons not parties to priority orders, but injuriously affected by such a chain of causation as is set out above, are not an obligation of the United States. (*Moore, etc., v. Rockford Knitting Co.*, 250 Fed., 278.)

DISPOSITION.

A final order will issue denying the claimant's claim.

Col. Delafield and Mr. Bayne concurring.

Case No. 1706.

In re CLAIM OF CONWAY CLOTHING CO.

1. **NEGOTIATIONS—NO AGREEMENT.**—Where claimant had negotiations with the Government for a clothing contract which was prepared in writing and submitted to claimant but was not executed by either party, and claimant is unable to fix dates of interviews or the name of any Government agent taking part in them, there is no agreement within the terms of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral agreement for overcoats. Held, claimant is not entitled to relief.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form A, has been filed, and the claim comes to this Board on appeal from the Claims Board, Director of Purchase.

The claim is for expenses and obligations incurred for rent, machinery, and equipment in preparation for the performance of an alleged contract with the Quartermaster Corps, United States Army, for the manufacture of 40,000 uniform overcoats.

The claim was set for a hearing before this Board on January 26, 1920, of which claimant was notified. At the hearing no one appeared to represent claimant. Claimant was accordingly notified that if it still desired to present its claim in person it was at liberty to do so upon advising this Board to that effect within 10 days. No reply has been had from claimant, and it, therefore, becomes necessary to dispose of the claim upon the record as it stands.

STATEMENT OF FACTS.

Claimant is a corporation engaged in the business of manufacturing clothing in New York City.

It appears from the record that claimant had a series of contracts with the Quartermaster Corps during the year 1918 covering various articles of clothings upon which it was engaged from a period extending from June to November of 1918.

During that period claimant appears to have made certain purchases of sewing machinery and equipment suitable for the work on which it was engaged.

Sometime prior to October 29, 1918, claimant appears to have had negotiations with the depot quartermaster's office in New York City

looking to the issuance of the contract to claimant for 40,000 overcoats at \$1.90 each, or an aggregate price of \$76,000, and apparently a contract to this effect was prepared in writing to be executed by claimant and Maj. John R. Holt, Quartermaster Corps, located at New York, to bear No. 7610-N, to be dated October 29, 1918, and calling for deliveries up to February 21, 1919. It appears also that this proposed contract was submitted to claimant, but that it never was executed on the part of the Government and never was actually delivered to claimant as a completed document.

Claimant contends that this uncompleted contract was the culmination of negotiations had during the summer of 1918 with the depot quartermaster's office in New York, in the course of which claimant was promised a contract in the terms above set forth by some one in the depot quartermaster's office, and on the strength of this promise that it made the expenditures and incurred the obligations covered by the claim.

All negotiations leading to the actual issuance of this contract appear to have terminated on November 12, 1918.

DECISION.

Upon this record it is not possible to hold otherwise than that the evidence is not sufficient to sustain the claim.

The statement of expenses made by claimant in its statement of claim covers a period extending from June to November, 1918, during which it was working on a number of other contracts.

It is not possible from the record to connect these purchases with the alleged contract on which claimant relies. Moreover, claimant is not able to furnish the date of the negotiations leading up to this contract or the name of the officer in the New York depot quartermaster's office with whom such negotiations were conducted, but states that its claim must stand or fall on the record as it is. On the other hand, Mr. Harry L. Wells, who was acting chief of the uniform section of the New York depot quartermaster's office during 1918, and who presumably would be conversant with the negotiations, if any, states that while he remembers having some dealings with claimant concerning uniform contracts, he did not at any time promise claimant a contract.

In view of the foregoing, there is not sufficient evidence to show any agreement between claimant and the Government.

DISPOSITION.

The claim should be denied.

Col. Delafield and Mr. Patterson concurring.

Case No. 1915.

In re CLAIM OF MADDOX TABLE CO.

1. **ADDITIONAL ORDER; NO EXTRA EXPENSE.**—Where a formal order had been given for airplane propellers, and later a request for the shipment of five propellers for a special purpose is made, claimant is entitled to no adjustment, even if it was justified in treating the request to ship as an additional order, if in fact it incurred no expense on account thereof and no propellers were made, or expense incident to the making of propellers incurred, after the receipt of the letter requesting that five propellers be shipped.
2. **EVIDENCE—AFFIDAVITS.**—Where witnesses testified in detail at the trial, their testimony will not be considered as contradicted by affidavits filed with the Board of others who did not appear for cross-examination.
3. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for five airplane propellers. Held, claimant not entitled to recover.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, for \$420, by reason of an agreement alleged to have been entered into between the claimant and the United States. The claim was set for hearing, but the claimant did not appear.

2. Claimant had a formal contract, No. 2750 Signal Corps, based on order No. 20564, for 250 airplane propellers at a unit price of \$84.

3. On or about June 19, 1918, it received a letter under date of June 17, from the Office of the Director of Aircraft Production, reading:

“1. This office has been requested to arrange for the shipment of five propellers to be used for exhibition purposes at different county fairs.

“2. Inasmuch as your company is the only one at this time manufacturing 8-25 design, it is requested that you prepare five propellers of this type to be manufactured in exact accordance with specifications, but with the exception of your trade-mark.

“3. Shipping instructions will then be issued immediately for the forwarding of these propellers as directed.”

4. Under date of June 22d, the claimant replied as follows:

"We acknowledge yours of the 17th inst., requesting us to enter order for five propellers 8-25 design, which we infer are to be manufactured from oak same as those manufactured by our order No. 20564, contract No. 2750.

"We understand this is in addition to the quantity covered by the above-named contract, and will proceed at once with the manufacture of same.

"Will we be furnished with a special order and contract number to cover this additional order?"

5. After the close of business June 24, claimant received from the signal equipment office the following telegram concerning claimant's letter of the 22d:

"Five propellers to be finished for exhibition purposes to apply on original order. Shipment must be made within one week."

6. Claimant states that when the letter of June 17, 1918, was received on June 19 all the propellers necessary to fill its pending order had been cut out and glued, and those not already shipped were well along toward completion; that it immediately had six propellers cut out and glued up, one extra being included to allow for defects and rejections, and that on June 24, 1918, the same were all rough-cut.

7. George L. Weller, a Government inspector who had his office in the plant of the claimant, and spent about three-fourths of his time there, produced at the hearing what he stated were office records made in the claimant's plant at the time of the transactions recorded. These showed that the particular five propellers for which claim is made were cut out and glued on June 8, 1918.

8. Mr. Weller testified claimant made 270 propellers at the outset in order to have 20 to cover rejections, and that subsequently, on June 8, it had 5 more glued for the same purpose, although the inspectors then expressed the opinion that there were already enough to cover rejections. Mr. Weller testified that claimant manufactured only 275, and that none of them were begun after the receipt of the letter of June 17.

DECISION.

1. Claimant may well have believed from the letter of June 17 that it was ordered to manufacture five additional propellers, but its reply: "We understand this is in addition to the quantity covered by the above-named contract," indicates it was not wholly free from doubt on that point.

2. Assuming that the claimant might be entitled to compensation by reason of work done on the faith of this correspondence, the weight of the evidence indicates that the work was not done thereunder but under a previous contract, and with a view merely to ful-

filling that contract by making ample provision for possible rejections of manufactured propellers.

3. It may be that if claimant had seen fit to appear at the hearing it could have reconciled its claim with the evidence for the Government. This Board, however, can not accept affidavits of those who do not appear for cross-examination as contradicting the circumstantial testimony of witnesses who testify at the hearing.

4. The Board must conclude that claimant is in error in asserting that the five propellers in question were manufactured upon the faith of the letters of June 17 and June 22, 1918, and that, accordingly claimant has not established the alleged contract.

DISPOSITION.

An order will issue from this Board denying relief.
Col. Delafield and Mr. Smith concurring.

Case No. 2313.

In re CLAIM OF SPLITDORF ELECTRICAL CO.

1. **REFORMATION OF CONTRACT.**—Where a formal contract provided for the price and stated that said price was taken from the current catalogue of claimant and, after performance, it was discovered that the prices stated in the contract were less than the prices stated in the current catalogue, and claimant renders voucher according to the price in the catalogue, and is refused payment, and claimant changes the voucher to conform to the contract price and receives payment, claimant is not entitled to a reformation of the contract.
2. **WAIVER.**—In such a case claimant waived any right it might have had of a reformation by amending his voucher and accepting payment.
3. **TWO DIFFERENT PRICES PROVIDED FOR IN THE CONTRACT.**—Where certain items were not paid for by reason of having the wrong number, and it appears that the contract provided for a unit price of 10 cents, and the catalogue provided for a unit price of 60 cents, and there was no waiver as in the case of the other items, the contractor may be paid according to the unit price of 60 cents, which is deemed to be the correct price according to the intent of the parties.
4. **CLAIM AND DECISION.**—Claim is made under a formal contract for \$610.83 by reason of the contract providing for two different prices for the same articles, claiming the contract should be reformed. Held, claimant is not entitled to reformation or to recovery with the exception of one item amounting to \$78.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This claim was originally submitted to the Claims Board, Office of the Director of Purchase, which board declined to assume jurisdiction. The claim was then filed here. The relief asked for is reformation on the ground of mistake.

FINDING OF FACTS.

1. On September 9, 1918, the claimant company entered into an agreement with the United States, evidenced by contract Motors No. 389 on Purchase Request No. 1098 for the delivery of ignition parts for Indian motor cycles. The purchase request provides as follows:

“Splitdorf Electrical Co. ignition parts in quantities and of the description shown on the attached list. Prices shown are list taken from current catalogue.”

A schedule, A, was attached to the contract, which provides, in part, as follows:

"Splitdorf ignition parts in the quantities and of the description shown on the attached list marked 'Schedule X,' which is made a part hereof, like article commercially furnished to the trade.

"Prices shown in Schedule X are taken from current catalogue."

The prices listed in Schedule X purport to be taken from the current catalogue, but said prices vary from the prices named in the catalogue as to a number of items. The difference between the prices named in the catalogue and the prices named in Schedule X aggregates about \$600 in favor of the claimant.

2. The claimant proceeded to manufacture and deliver the articles called by for the contract without taking any action to correct the discrepancy between Schedule X and the catalogue. The entire contract was completed, and all articles delivered except parts Nos. 8747, 4377, 1601-A, 2928, 4228, and 4266. When the work was completed and the articles delivered, with the exception of those stated above, the claimant submitted vouchers and invoices in the amounts specified in the current catalogue. When these vouchers were submitted for payment, claimant was informed that it could not receive payment unless it caused the vouchers to be amended to correspond with the prices specified in Schedule X. The claimant then withdrew its vouchers and submitted other vouchers to correspond with Schedule X, and such vouchers so corresponding were paid. There is, however, one item under Schedule X for which the claimant has neither submitted a voucher or received payment. As to this item two errors occurred in the preparation of the list in Schedule X. The part number is specified in Schedule X to be 8747 instead of 14371, and the unit price is specified in Schedule X as 10 cents instead of 60 cents. This article was shipped under item 14371 and was accepted by the United States, but was not given credit for delivery, inasmuch as the article was not delivered under item 8747 of the Schedule X list. The claimant asks that the contract be reformed on the ground of mistake, and it is admitted that a mistake occurred as set out above.

DECISION.

The claimant company having submitted vouchers setting forth that the prices named therein were in accordance with the contract, and having accepted payment thereunder with full knowledge at that time of the mistake, it must be concluded that as to such articles as it has accepted payment for, it has waived right to ask for reformation. As to all such other articles, its claim for reformation must therefore be denied.

With reference to item No. 8747, unit price \$0.10 (Schedule X) 200 cams (l. h.), which item should be part No. 14371, unit price \$0.60, it may be paid the correct price according to the intention of the parties, which price is hereby decided to be \$0.60 each, or the aggregate of \$78.

DISPOSITION.

The papers herein will be transmitted to the Claims Board Office of the Director of Purchase, with the suggestion that a certificate of fair value for \$78, in consideration of the delivery to and acceptance by the United States of 200 cams, part No. 14371 (l. h.), and pursuant to the intention of the parties under the said contract, be issued to the claimant. In all other respects this claim must be denied.

Col. Delafield and Mr. Bryant concurring.

Case No. 566.

In re **CLAIM OF THE ALUMINUM GOODS MANUFACTURING CO.**

- 1. REIMBURSEMENT FOR EXPENDITURES IN ANTICIPATION OF CONTRACT.**—In the absence of an agreement, claimant is not entitled, under the act of March 2, 1919, to reimbursement for expenditures made in anticipation of obtaining a contract. A recommendation that claimant be awarded a contract is not an agreement.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon written notification that claimant had been recommended for a contract for 300,000 canteen cups. Held, claimant is not entitled to relief.

Mr. Patterson writing the opinion of the Board.

FINDINGS OF FACT AND DECISION.

This claim arises under the act of March 2, 1919. Statement of claim upon a form of claimant's own devising has been filed prior to June 30, 1919. Claimant's attention was called by letter dated August 12, 1919, from this Board to the fact that said statement of claim was defective in that it did not allege all the matters required to be shown to bring said claim within said act of March 2, 1919.

Claimant's attention was further called to said omission by a letter of September 20 and a letter of September 26, 1919, but no amendment to said notice of claim was ever made, so far as shown by the records of this Board.

The nature, terms, and conditions of the alleged agreement resting entirely upon the correspondence hereinafter set forth, it is apparently a class A claim.

A hearing was held at the office of the Board on January 15, 1920.

FINDINGS OF FACT.

The Board finds the following to be the facts:

I.—Claimant is, and at the times hereinafter mentioned was, engaged in the manufacture of aluminum ware at Manitowoc, Wis., and Newark, N. J. Prior to October 11, 1918, it had been engaged in the manufacture of goods upon Government contracts or orders, including one contract for 1,000,000 aluminum canteens. This contract has been fully settled and terminated.

II.—On or about October 11, 1918, claimant wrote and dispatched a letter which was duly received by the addressee, as follows:

[COPY.]

OCTOBER 11, 1918.

Lieut. E. C. HUNTER,

*Office of Quartermaster General, Hardware and Metals Division,
Kitchen and Camp Equipment Branch No. 3, 1800 Virginia
Avenue, Washington, D. C.*

Re canteens, cups, and meat pans.

DEAR SIR: We have gone over the orders we have in the process of manufacture and find we will have them all completed and shipped on or before December 1, 1918.

Our production has been increased from time to time, and we are now making more than 15,000 per day and soon will be making 25,000 per day.

We would like further orders, so that we could place our orders for German silver, chains, steel, etc., before the winter comes on, so that we will not be held up for want of same.

Furthermore, in order to keep our organization intact, we must know very soon whether or not we are to receive any further orders.

Enclosed find our proposal on canteens, cups, and meat pans, which we trust will interest you.

Yours, very truly,

ALUMINUM GOODS MFG. Co.

GV: EHK

By

Enclosure—1.

III.—On or about October 16, 1918, claimant wrote and dispatched a letter dated on that day, which was duly received by the addressee, as follows:

[COPY.]

OCTOBER 16, 1918.

Lieut. E. C. HUNTER,

*Office of the Quartermaster General,
Hardware and Metals Division,
1800 Virginia Avenue, Washington, D. C.*

DEAR SIR: I beg to inform you that our Newark factory expects to have their entire order for canteen cups completed not later than Nov. 15, and we are very anxious to know whether or not we should continue the manufacture of same at our Newark factory.

If you desire us to keep our organization, etc., intact, we must know immediately whether or not we are to receive any more orders; otherwise our organization will probably leave us and seek employment elsewhere.

If necessary, and should you desire a conference with me on the subject in Washington, kindly wire me.

We hope you can see your way clear to favor us, as we have a capacity there of not less than 10,000 per day.

If possible, wire us your decision.

Yours, for the fourth Liberty loan,

ALUMINUM GOODS MFG. Co.

By

GV: EHK

Copy to Mr. Remus Koenig.

IV.—On or about October 22, 1918, a letter dated on that day was written and dispatched from the office of the Acting Quartermaster General to claimant and duly received, as follows:

(Copy.)

OCTOBER 22, 1918.

No.: 414.3 HM-P.

From: Acting Quartermaster General.

To: Aluminum Goods Manufacturing Co., Manitowoc, Wis.

Subject: Canteen cups.

1. In answer to your letter of October 16th we wish to advise that we have already recommended you for an order of 500,000 canteen cups, to be packed for export. It is now a rule in the Quartermaster Corps that orders can not be promised to prospective contractors; this to protect the Quartermaster Corps against the event of adverse decision upon our recommendations to the Review Board. As stated above, however, we have made this recommendation for your Newark plant and hope to obtain an order number for you before many days.

By authority of the Acting Quartermaster General:

W. A. GRAHAM,
Chief Hardware and Metals Division,
By E. CARLISLE HUNTER,
Lieut., Ord. Dep't, U. S. A.

ECH-AMS

V.—On or about October 28, 1918, claimant was sent and dispatched a letter dated on that day, which was duly received by the addressee, as follows:

(COPY.)

OCTOBER 28, 1918.

Lieut. E. C. HUNTER,

Office of the Quartermaster General,
Hardware & Metals Division, 1800 Virginia Ave.,
Washington, D. C.

Re canteen cups.

DEAR SIR: We have your letter of October 22 and note that you have made recommendation that we be favored with an order for 500,000 canteen cups for export, to be made at our Newark plant.

Our Newark factory wired us this morning that their present order was completed, and I therefore wired them to continue the manufacture of cups.

I hope that you will send us an order, or, better still, wire us the order number as soon as your recommendation has been passed by the review board.

Yours, very truly,

ALUMINUM GOODS MFG. CO.,
By

GV:EHK.

VI.—On October 31, 1918, a letter dated on that day was written and dispatched from the office of the Director of Purchase to claimant and duly received, as follows:

(COPY.)

Oct. 31, 1918.

No.: 414.3 HM-P.

From: The Director of Purchase.

To: Aluminum Goods Manufacturing Company, Manitowoc, Wis.

Subject: Canteens and cups.

1. We have your two letters of October 28th and telegrams of October 30th, one addressed to Mr. Jerrison and one to me. After your conversation with the writer upon your visit to Washington, we believed that you thoroughly understood that the Aluminum Goods Manufacturing Company would be properly taken care of and given every opportunity to obtain mess-equipment business.

2. You will note that the advertisement read that the business would be placed on or before November 5th. We can advise you that both the canteen and cup authorizations are closed and have been for several days. The interests of the Aluminum Goods Manufacturing Company were properly looked out for, and you were recommended for 569,712 canteens at 56 cents for export shipment.

3. The cup situation has changed slightly in that our authorization was decreased by over 650,000 through a clerical error in the Ordnance Department. It was, therefore, necessary to reduce our award for Newark to 300,000 cups. If this decrease in authorization had not taken place, the recommendation would have gone through as we previously advised you.

4. At this time it appears to us that the requirements for mess equipment will be reduced rather than augmented. The anticipated requirements have been considerably in excess of actual demands, wherefore, we do not expect any further authorizations to procure at least until next January.

5. This information is entirely unofficial and we are endeavoring to point out to you the situation as it appears to us so that you can act as you see fit. It would be our advice to taper off production so that present contracts in conjunction with those for which we have recommended you, would last you at least up until April 1, 1919. As you perhaps know we are now buying requirements through June, 1919, and it is a question whether we will be authorized to procure beyond June requirements until after the first of the year. We are, therefore, making this suggestion with a view to keeping your plants in continuous production and holding your organization intact.

6. As stated above we are advising merely on our best knowledge and in no way obligating you to act thereupon.

By authority of the director of purchase:

W. A. GRAHAM,
Chief, General Supplies Division.

By E. CARLISLE HUNTER,
Lieut., Ord. Dept., U. S. A.

ECH-AMS

VII.—On or about November 13, 1918, claimant wrote and dispatched a letter dated on that day which was duly received by the addressee, as follows:

(COPY.)

Nov. 13, 1918.

Lieut. E. C. HUNTER,

*Metals and Hardware Division, Ordnance Department,
1800 Virginia Ave., Washington, D. C.*

DEAR SIR: I beg to inform you that since receiving your letters stating that you had recommended that we be favored with further canteen cup orders, we have placed our orders for raw materials covering 300,000 cups, but have made no preparations for a further supply of canteens.

We are giving you this information, and if it is at all possible we hope you will be able to confirm and send us an order for the 300,000 cups.

Yours, very truly,

ALUMINUM GOODS MFG. CO.

By

GV: EHK

VIII.—On or about November 16, 1918, a letter dated on that day was written and dispatched from the Office of the Director of Purchase and Storage to claimant and duly received, as follows:

(COPY.)

NOVEMBER 16, 1918.

No: 414.3 GS-P.

From: The Director of Purchase and Storage.

To: Aluminum Goods Manufacturing Company, Manitowoc, Wis.

Subject: Mess equipment.

1. We have your letter of November 14th with reference to canteens and canteen cups.

2. As we have already advised you, you were recommended for an order for 300,000 cups to be made up in your Newark plant. Due to the rapid change of affairs this office has done no procuring in over a week and recommendations now in process are being temporarily held up. We are unable to determine what action will be taken on those contracts not as yet issued. We would, however, recommend that the matter be allowed to remain dormant until a definite policy is determined upon by the General Staff. We are unable to determine how you could conveniently arrange for your raw materials for these cups without the Government order number, and we must advise at this point that the Office of the Director of Purchase and Storage can be in no way responsible for any action you might take on your own initiative.

3. Canteen recommendations are made, as we have already notified you, and the situation on this item is identical with that of cups.

4. We shall be glad to notify you when any of these recommendations are released in the form of contracts, and will keep you posted

on any action of the Government which might be of interest to you in formulating a definite policy.

By authority of the Director of Purchase and Storage:

WM. A. GRAHAM,
Chief, General Supplies Division,
By W. CARLISLE HUNTER,
Lieut., Q. M. C., U. S. A.

ECH-AMS

IX.—On or about November 22, 1918, a letter dated on that day was written and dispatched from the office of the Director of Purchase and Storage to claimant and duly received, as follows:

(COPY.)

NOVEMBER 22, 1918.

No. 414.3 GS-P.

From: The Director of Purchase and Storage.

To: Aluminum Goods Manufacturing Co., Manitowoc, Wis.

Subject: Mess equipment.

1. Listed below are all recommendations made by this office covering mess equipment items for your concern.

569,712 canteens, model 1910.

300,000 cups, model 1910.

2. The canteen contract has not been passed upon by the Board of Review. Due to the surplus canteens on hand, this contract will, undoubtedly, never be issued to you. You had, therefore, best consider this matter dead.

3. We understand that work has already commenced in your New-ark plant on the prospective order for 300,000 cups. Every effort is being made by this office to get this order through and we believe it will be accomplished. As we have previously recommended, however, we strongly advise that as little action be taken on these cups as possible.

4. Please acknowledge receipt of this letter.

By authority of the Director of Purchase and Storage:

WM. A. GRAHAM,
Chief, General Supplies Division,
By E. CARLISLE HUNTER,
Lieut. Q. M. C.

ECH-AMS.

X.—On or about November 25, 1918, claimant wrote and dispatched a letter dated on that day which was duly received by the addressee, as follows:

(COPY.)

Nov. 25, 1918.

Lieut. E. CARLISLE HUNTER,

Quartermaster Corps, Hardware and Metals Division,
1800 Virginia Ave., Washington, D. C.

DEAR SIR: Your communication of November 22 regarding mess equipment received.

1. Canteens: We are not interested in any further orders except the completion of our present contract and will consider this matter dead as you suggest.

2. Cups for canteens: As stated in our former letter, we would like to have an order for an additional 300,000, but are not taking any more action than necessary toward completion. We have, however, all of the stock for these cups on hand, some made up and some in the process of manufacture.

Yours, very truly,

ALUMINUM GOODS MFG. CO.

By

GV: EHK

XI.—The aggregate amount claimed by the petitioner, \$44,227.65, comprises its alleged loss on materials purchased by it consisting of aluminum sheet, aluminum rivets, omega sheet, omega wire, emery, rag paper, sealing wax, wrapping paper, boxes, waterproof paper, and omega wire hinge pins, to a total amount as stated in its notice of claim, of \$70,212.50, from which it deducts a salvage value, as estimated by it in its said notice of claim, of \$25,984.85.

Copies of invoices presented by claimant in many cases bear dates prior to October 22, 1918, that being the date of the letter of the Acting Quartermaster General to claimant stating that it had been recommended for an order for 500,000 canteen cups which letter is set forth in Finding of Fact IV.

In many cases these invoices bear date several months prior to said letter, which is the earliest communication in date offered by claimant in which the statement is made that it would be recommended for a contract.

In view of the conclusion as to this claim reached by the Board, it is unnecessary to separate these items and determine which, if any, of them were shown to have been purchased on the faith of said letter.

CONCLUSION.

The only witness appearing before the Board at the hearing held on January 15, 1920, was H. L. Vits, claimant's purchasing agent. Nothing appeared from his testimony which supplemented the written evidence set forth in the foregoing findings or added to its effect as establishing an agreement between the Government and the claimant for 300,000 canteen cups or any other number of canteen cups or other articles. The claim, therefore, rests entirely upon the correspondence, and it is the conclusion of the Board that it does not establish any agreement on the part of the Government upon which claimant was justified in relying to the extent of purchasing materials or entering into commitments for them.

The letter of October 22, 1918 (Finding IV), while advising claimant that a recommendation for an order of 500,000 cups had been made, states expressly,

"It is now a rule in the Quartermaster Corps that orders can not be promised to prospective contractors; this to prevent the Quartermaster Corps against the event of adverse decision upon our recommendations to the Review Board."

In the letter of October 31 (Finding VI), it is stated:

"This information is entirely unofficial *and we are endeavoring to point out to you the situation as it appears to us so that you can act as you see fit.* * * * *As stated above we are advising merely on our best knowledge and in no way obligating you to act thereupon.*"

These are the only two letters from the Government to claimant of date prior to November 12, and are in no way supplemented by any further evidence tending to establish an agreement within the act of March 2, 1919. It is therefore, the conclusion of the Board that in so far as claimant purchased or committed itself for material in the expectation of a contract for cups it took a business risk for which the Government is in no way responsible.

DECISION AND DISPOSITION.

There was no agreement within the purview of the act of March 2, 1919, between the United States of America and claimant which can be adjusted, paid, or discharged by the Secretary of War under the power and authority conferred upon him by said act.

This Board will enter a final order in the usual form, denying the relief applied for.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 1934.

In re CLAIM OF SANFORD NARROW FABRIC CO.

1. **REFUSAL TO SIGN CONTRACT.**—Where on October 19, 1918, claimant's representative and a Government official entered into an oral contract for the manufacture of 70,000 yards of herringbone tape, deliveries to begin November 16, and a formal written contract was sent claimant, the terms of which conformed to the oral contract, and claimant refused to sign same, there is no binding contract subsequent to such refusal.
2. **PRIOR COMMITMENTS.**—In such a case, where it appears that the materials intended to be used in performing this contract were purchased prior to the oral contract, there is no obligation on the Government to reimburse claimant for loss on such commitments, as they were not purchased "upon the faith of the same."
3. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$176.88 for materials purchased. Held, claimant is not entitled to recover.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board find the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form "B," has been filed under Purchase, Storage and Traffic Division, Supply Circular No. 17, 1919, for \$176.88 by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. This claim is for loss alleged to have been incurred, amounting to \$176.88, on account of yarn purchased but disposed of at a loss after an alleged contract with the Government for 70,000 yards of herringbone tape, aggregating \$1,944.44, was canceled.
3. On October 19, 1918, Mr. Chapman, a civilian employee of the Office of the Acting Quartermaster General, cotton goods branch, Washington, had a conversation with the claimant, which was confirmed on the same day by letter signed "Robert G. Pratt, Sub-Cotton Goods Division, webbing section," of the Office of the Acting Quartermaster General, which letter contained the following paragraphs:

"1. Confirming telephone conversation with Mr. Chapman this morning, this office proposes to send you an order for 70,000 yards of $1\frac{1}{2}$ " herringbone tape, unbleached, the price to be \$4.00 per gross yards, net f. o. b. your factory, delivery to be made at the rate of 10,000 yards weekly, beginning November 16, 1918, the entire order to be completed by January 4, 1919.

"2. You are requested to send as soon as possible specifications for the above material, including the outside number of warp ends, the number of picks per inch, size of the warp and filling yarn, and the weight per gross yards. These specifications are required in making up a formal order."

On October 21 the claimant replied as follows:

"We thank you for your order for 70,000 yards of $1\frac{1}{2}$ -inch twill tape and same will have our attention.

"You know we bought sufficient yarn to make 200,000 yards of this and we were wondering if there was something else your department was in need of in the same construction so we can use this number. We do not know just exactly how many pounds there are, but will let you know in a day or two.

"In the meantime, if there is anything we can quote on, we will be very glad to do so."

4. On October 29 the office of the Quartermaster General, New York, sent the claimant three copies of contract No. 7516-B, dated October 26, 1918, drawn to cover the proposed order, with the request that they be signed and returned for approval and completion of signatures. On November 12 the claimant returned the contracts unexecuted, with the advice that it was unable to start deliveries on November 16, as called for in the contract (and as previously agreed), but could begin deliveries on November 23, and so asked to have the delivery dates in the contract altered accordingly. The contract was never returned to the claimant, and on November 15 it received notice of cancellation of the order.

5. In a questionnaire, which is part of the record, the claimant makes oath that it purchased the yarn to fill the order for 75,000 yards of herringbone tape on September 26 and October 10, 1918. The claimant alleges that part of this yarn was used by it on other work at a loss to it of \$96, and the remainder was returned to the contractor from which it was purchased at a loss to claimant of \$176.88. None of it was used in the manufacture of the herringbone tape for the Government, because the claimant did not begin to make that tape and did no work under the order from the Government.

DECISION.

1. By letter of October 19, 1918, the Government's representative notified the claimant that it proposed to send claimant an order for 70,000 yards of herringbone tape at a price named, "delivery to be

made at the rate of 10,000 yards weekly, beginning November 16, 1918, the entire order to be completed by January 4, 1919."

By letter of October 21, 1918, claimant replied expressing its thanks for the order and stating that it had "bought sufficient yarn to make 200,000 yards of this" tape, and would be glad to use this amount if the department had other requirements.

When a contract was submitted to claimant embodying the terms of the Government's letter of October 19, the claimant declined to sign the contract because it would not sign a contract requiring the first delivery to be made on November 16. No formal contract, as contemplated, was entered into, and the claimant did no work under the proposed order, but on November 15 it received notice of cancellation of the said order.

2. Whatever interpretation may have been put upon the two letters above quoted, it is apparent that the intention of the parties as expressed thereby was to subsequently make a contract which should require deliveries to be made 10,000 weekly, beginning November 16, the entire order to be completed by January 4, 1919. Time was an essential element of the proposed contract. When, however, the proposed contract containing these essential provisions was submitted to the claimant, on October 29, it declined to sign the same unless the delivery dates were changed. It thereby withdrew its former tentative assent to make a contract containing the elements of agreement which the Government had proposed. As the claimant refused to be bound by the covenant in the proposed contract requiring deliveries to begin on November 16, and abrogated the preexisting tentative agreement, it follows that neither the proposed contract nor the prior alleged agreement laid any burden on the Government.

3. Even though it be admitted that there was an agreement in existence between October 21 and November 12 (which was then abrogated by the claimant), it is not shown that the claimant made any expenditures between these dates.

On October 21 the claimant had on hand sufficient material to make 200,000 yards of herringbone tape. The material, sufficient for 70,000 yards of tape, which forms the basis of the claim here presented, was purchased by the claimant on September 26 and October 10, prior to the alleged agreement with the Government, which was made, if at all, on October 19 or 21. There was no performance of the alleged agreement, in whole or in part, prior to November 12, 1918, when the alleged agreement was abrogated by the claimant.

It is clear that the material in question was not purchased as a result of any agreement with the Government, but was merely

stock on hand which had been purchased in the usual course of business for some purpose not disclosed by the record, but probably in anticipation of future orders. The claimant refused to accept the offer of a contract on the terms tendered by the Government, and it must, therefore, sustain the losses caused by depreciation in value of such materials, because the act of March 2, 1919, does not authorize relief under the circumstances stated.

4. We are therefore unable to find that the claimant made any expenditures on faith of any agreement, which finding is essential in order that reimbursement may be allowed under the act of March 2, 1919.

5. For the reasons stated the Board is, therefore, of the opinion that the relief prayed for should be denied.

Col. Delafield and Mr. Shirk concurring.

Case No. 185.

In re **CLAIM OF UNITED STATES AMMUNITION CO.**

- 1. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$3,033.23 for commitments on oral contract for reclaiming shells. Held, agreement was made for reclaiming 30,000 shells on a cost-plus-10-per-cent basis.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$3,033.23, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On or about the 4th day of November, 1918, Capt. H. S. Garrett, of the Ordnance Department, telephoned Mr. Hemsworth, a representative of the claimant at Poughkeepsie, N. Y., and requested the claimant to undertake the work of cleaning, revarnishing, and otherwise reclaiming 30,000 shells which had been damaged by fire, on a cost-plus-10-per-cent basis.

3. The claimant agreed to do said work. On November 9, 1918, the claimant began to clear space in its factory and to do carpenter work and otherwise prepare the said space for the performance of said work, and made certain expenditures therefor between the dates of November 9 and November 12, 1918. (Testimony of Mr. Wood, p. 46.) On November 11, 1918, the claimant wired the Canada Cement Co., Montreal, Canada, asking the price on a second-hand copper hand turning machine to be used for said work. On November 27, 1918, the claimant wired the Canada Cement Co. offering \$1,000 for said machine. The Canada Cement Co. wired its acceptance of said offer on the same day. The claimant sent the Canada Cement Co. a draft for \$1,000 in payment of said machine on November 29, 1918.

3. On November 27, 1918, Maj. R. D. Day wrote the claimant requesting it to suspend all work on the said order.

4. Capt. H. S. Garrett testified that on or about November 4, 1918, he attended a conference in the Ordnance Department, at which Maj. Field was present with several others, and that he was authorized at

that time to make arrangements for salvaging the said shells (p. 8); that it was his custom to make contracts for the Government at that time; and that he made other oral contracts, and that he did it with the knowledge and sanction of his superior officer, Maj. Day, who approved it. Maj. Day testified (p. 29) that Capt. Garrett had authority to make contracts relating to artillery supplies, and that (p. 33) such authority was given by him orally to Capt. Garrett.

5. James Wood, president of the claimant, testified (p. 41) that the claimant did not receive Maj. Day's letter asking that work be suspended on the said contract until November 29, 1918. In the meantime (p. 36) the claimant had made expenditures for labor and materials, had moved materials to clear space required for the work, and made concrete tanks and installed electric lights and had otherwise prepared for said work; that he had examined the claimant's statement of claim, amounting to a total of \$3,033.23, and that (p. 47) the said sum was a fair and just amount for the services and materials furnished.

DECISION.

1. The Board finds that Capt. H. S. Garrett, under authority established by the custom of his division, on or about November 4, 1918, entered into an oral agreement with the claimant and that in pursuance of said agreement the claimant made certain expenditures for labor, materials, machinery, and equipment, and that part of said expenditures were made before November 12, 1918. Under the provisions of the act of March 2, 1919, the claimant should be reimbursed for the said necessary expenditures, and in addition a sum equal to 10 per cent of the amount of said expenditures, as this was a cost-plus-10-per-cent agreement.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5 of Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield, Mr. Huidekoper, and Mr. Henry concurring.

Case No. 2325.

In re CLAIM OF ELMER G. PORTER.

1. **WEIGHT OF EVIDENCE.**—Where claimant's loader makes affidavit that a carload of hay contained a certain number of bales of a certain weight, and the Government's agent makes affidavit that he unloaded the hay and found that the car contained a certain smaller number of bales of less total weight, claimant has not proved his claim for payment for the difference in weight.
2. **CLAIM AND DECISION.**—Claim for an additional sum of \$39.29 for hay delivered under a Quartermaster Department Purchase Order. Held, claimant is not entitled to relief.

Lieut. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Classification Claims Board, Settlements Division, Finance Service, on a claim for \$39.29 on a formally executed contract under the following circumstances:
2. It appears that the claimant, Elmer G. Porter, was, under formal order No. 1729 of the Quartermaster Department, to furnish certain quantity of hay to the quartermaster at West Point, N. Y. Under this order the claimant had shipped several cars of hay, which were refused on account of the hay being hot and molded. One of the cars so shipped was marked "No. 30248 D. L. & W." and billed to West Point under date of July 23, 1918. This car of hay was at first reported to be in bad order, but was later inspected by the claimant's inspector, Mr. Charles Anhalt, in the presence of Maj. Philip Gordon, and was found to be in good condition, and same was accepted by Maj. Gordon.
3. The dispute involved in this claim arises out of the variance between the affidavit of the claimant's loader, Mr. W. D. Leam, as to the weight of the car of hay and that of Sergt. Thomas Gillick, who was the forage master at West Point, as to the weight of the hay when same was received by him. Mr. Leam makes affidavit to the effect that on or about July 23, 1918, he loaded D. L. & W. car No. 30248 at Lock, N. Y.; that he carefully checked and tallied every bale as it was put into the car, and that the car contained a total

of 124 bales, weighing all told 21,233 pounds. Sergt. Thomas Gillick in his affidavit stated that when the car arrived at West Point he counted and weighed each bale of the hay and found only 110 bales of hay in the car, same weighing 18,295 pounds. Sergt. Gillick further stated that prior to opening the car doors he examined the seals and found the same intact; and that the total weight of the hay was arrived at by weighing each bale separately. Mr. Charles Anhalt, claimant's inspector, made an affidavit to the effect that the car doorways showed the car loaded in full.

4. The claimant was paid according to the weight found by Sergt. Gillick, and now makes claim for the sum of \$39.29, the difference between what he was paid and what he would have been paid had payment been made according to the weight found by his loader.

5. Pursuant to the request of the zone supply officer of Chicago, Ill., a board of officers was appointed by the superintendent of the United States Military Academy at West Point to investigate this claim. After a careful investigation the board reported adversely to the claimant's contention. The claimant, thereupon, appealed to the Claims Board, Office Director of Purchase, which board refused to entertain jurisdiction, and referred the claimant to the Auditor for the War Department. The Auditor for the War Department referred the claim to the Classification Claims Board, Settlements Division, Finance Service. The Classification Claims Board was unable to find any merit in the claimant's contention, and thereupon advised the claimant that he had the right to appeal from its decision to the Board of Contract Adjustment. The claimant availed himself of this opportunity and accordingly appealed to this Board.

DECISION.

1. This case presents purely a question of fact for this Board to determine. The only evidence that the claimant relied upon in attempting to establish his claim is the affidavit of his loader, Mr. Leam, as to the quantity and weight of the hay when it was loaded into the car at Lock, N. Y. Opposed to this is the affidavit of the Government's principal witness, Sergt. Thomas Gillick, forage master at West Point, whose duty it was to weigh all forage arriving at that point. Sergt. Gillick stated emphatically in this affidavit that he did check and weigh each bale of hay in the car in question, and that there was only 110 bales in the car, the total weight of which was 18,295 pounds; that he examined the seals on the car before opening same, and found them to be intact. There is also the affidavit of claimant's inspector, Mr. Charles Anhalt, which stated that he inspected the shipment on the track at West Point, and found

the car fully loaded. It would appear conclusive, therefore, that the car could not have been opened while en route and part of the hay taken therefrom.

2. In view of the above-mentioned affidavits, it would appear that the preponderance of the evidence is against the claimant, and that the weight of the hay upon its receipt at West Point, as determined by the Government's duly authorized agent, was the correct weight.

3. The action of the Classification Claims Board in refusing to pass favorably upon the claim is approved, and the petition of the claimant is denied.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Classification Claims Board, Settlements Division, Finance Service, for appropriate action.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 1912.

In re CLAIM OF RITCH & GRASHEIM.

1. **ANTICIPATED CONTRACT—PREPARATION FOR FUTURE WORK—RIGHTS OF PARTIES.**—Unless there was an agreement, express or implied, so to do, the United States Government is under no obligation, under the act of March 2, 1919, to reimburse claimant loss sustained in enlarging its plant and increasing its facilities to do Government work, even though it was given assurance that it would be recommended for future contracts.
2. **CLAIM AND DECISION.**—This claim arises under the act of March 2, 1919, and is presented upon the theory that claimant is entitled to reimbursement for loss sustained in equipping its plant to perform Government contracts that it had reason to believe would be awarded. Held, that there was no agreement within the meaning of the act of March 2, 1919, that obligated the Government to reimburse claimant for loss sustained.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, by reason of an agreement alleged to have been entered into between the claimant and the United States on or about November 10, 1918. The amount of the claim is not set forth. The claim was filed with the Claims Board, Director of Purchase, and forwarded by said Board to this Board on the ground that there was no written evidence and it should, therefore, be considered a class B claim.

2. The claimant is a partnership. Jacob Ritch, one of the partners, testified that in August, 1918, he received a written contract for 38,000 pairs of trousers at 75 cents each, and in preparation for said contract he purchased certain machinery and leased new quarters on Arch Street, Philadelphia; that in September, 1918, he called on Capt. Lemon at the clothing headquarters in Philadelphia and was told that Capt. Lemon was out. He then talked with Capt. Brooks and informed Capt. Brooks that he wanted an extension of time on the said contract. The extension of time was later given him. He makes no claim under the contract for 38,000

pairs of trousers. The work under said contract was completed and paid for. He states that at said time Capt. Brooks informed him that if the claimant's work was satisfactory in producing 38,000 pairs of trousers, he would recommend that the claimant be given additional orders.

3. On November 7, 1918, Mr. Jacob Ritch called at the office of H. L. Wells, of the Clothing and Equipage Division in New York, and was told by Joseph Larkie that he could not see Mr. Wells. He then asked Mr. Larkie why an order had not been given claimant in response to claimant's bid for trousers, filed in October, 1918. Jacob Ritch said that Joseph Larkie informed him that the claimant would be awarded a contract for 20,000 pairs of trousers at 75 cents each. He said he understood by Mr. Larkie's statement that a contract would be recommended for 20,000 pairs of trousers to be made from Government-owned goods, and that a contract would follow. The claimant did not receive the said contract. He admits, however, that the claimant did nothing in preparation for the said work on the expected contract for 20,000 pairs of trousers.

4. Edwin Booth, counsel for the claimant, was asked on what theory he claims remuneration. He stated that he admits that no agreement was made with the claimant; but that he thought, in view of the fact that the claimant had installed machinery and had leased larger quarters and had lost civilian business, as set forth in the statement attached to an affidavit filed, stating a total loss of \$8,419.90, with the expectation of getting Government orders from time to time, as assured by various officers, he had concluded to set forth the facts before this Board with the hope that claimant might at some time obtain some relief over and beyond relief allowed under the terms of the act of March 2, 1919.

DECISION.

1. We find that no agreement was made with the claimant within the provisions of the act of March 2, 1919.

Col. Delafield and Mr. Harding concurring.

Case No. 2199.

In re **CLAIM OF OXFORD MANUFACTURING CO. (LTD.).**

1. **NO AGREEMENT.**—Where a price for goods is suggested by the Acting Quartermaster General, whose letter is shown to claimant who thereupon agrees to the price, but final arrangements are expressly stated to be subject to the approval of a depot quartermaster, who never approved them nor gave claimant an order, there is no agreement between the parties.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an alleged agreement that the Government would take 4,080 pairs of spiral puttees as seconds. Held, claimant is not entitled to relief.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$7,599.68, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. A hearing was held in the matter on January 30, 1920, at which the claimant was represented.

3. In 1918 the claimant had formal contracts for the manufacture of spiral puttees, 106 inches in length. Four thousand and eighty pairs failed to come up to the contract specifications, being from $1\frac{1}{4}$ to 2 inches short. The claimant made application to the Government to purchase these puttees as seconds.

4. On July 9, 1918, F. E. Haight, by direction of the Acting Quartermaster General, wrote the following letter to the depot quartermaster at Philadelphia:

JULY 9th, 1918.

From: Acting Quartermaster General.
To: Depot Quartermaster, Philadelphia.
Subject:

1. In reply to yours of July 1st and 8th concerning 4,000 pairs of puttees of the Oxford Manufacturing Company, Oxford, Nova Scotia, which do not come up to the required length, I beg to recommend that the allowance of 3c per pair is insufficient. These should be purchased as seconds at a discount of 20c per pair.

2. If this meets with your approval and the Oxford Manufacturing Company agree to do it, I will see that the contract is forwarded immediately.

By direction of Acting Quartermaster General:

By (Signed) KNIT GOODS BRANCH,
F. E. HAIGHT.

5. The above letter was sent to Mr. Hugh Finlan, Government inspector at Oxford, Nova Scotia, and was by him submitted to the claimant.

6. The claimant, thereupon, wrote the following letter:

OXFORD, N. S., *July 15th, 1918.*

HUGH FINLAN, Esq.,
*American Govt. Supply Inspector,
c/o Atlantic Underwear (Ltd.), Moncton, N. B.*
Re 4,000 pairs short puttees.

DEAR SIR: We have yours of the 13th enclosing letter dated 9th inst., from F. E. Haight, in which he states that he will see that a contract is forwarded to cover these immediately if we agree to dispose of these at 20¢ reduction under heading of "Seconds."

We have these on our hands, and consequently we must move same. We hoped to settle this by an allowance based on a pro rata basis, but if Mr. Haight will not concede us this settlement, we will agree to his offer, namely 20¢ cut per pair.

We trust that this contract will be to hand early so we may ship these out with goods going forward soon on contract 3850-P.

Yours, very truly,

OXFORD MFG. CO. (LTD.).

Mr. Finlan returned this to the Philadelphia office.

7. Thereafter, the claimant sent numerous telegrams and letters requesting orders to ship the puttees.

8. The purchase of these puttees was never approved by the depot quartermaster or his assistants at Philadelphia. No order was ever issued, and no direction given to the claimant to make shipment.

DECISION.

1. The letter of Mr. Haight, dated July 9, 1918, is not an order to the claimant. It is not addressed to the claimant, and the purchase of the puttees is expressly conditioned on the approval of the depot quartermaster. This approval was never given. The claimant was fully aware of this condition, as the letter was given them to read.

2. No order was ever issued to the claimant, and no contract with the Government, express or implied, arose out of the situation.

DISPOSITION.

1. Final order will issue, denying relief to the claimant.

Col. Delafield and Lieut. Col. Junkin concurring.

Case No. 657.

In re CLAIM OF ALCOHOL PRODUCTS CO.

1. **REOPENING SETTLEMENT.**—Where a settlement contract was made between claimant and the Secretary of War, and claimant accepted the award made thereunder, and said award reserved to claimant the right to file suit in a competent court, for a disallowed item, claimant has no right to reopen the matter of said item before the Secretary of War.
2. **SAME—LOSS OF POWER TO AMEND.**—Where a contract was amended by settlement contract and an award was made thereunder, and claimant accepted the award, the power of the Secretary of War to further amend the contract ceased.
3. **PROSPECTIVE PROFITS.**—Where a claim is based upon the suspension of a Government contract prospective profits will not be allowed.
4. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for \$8,000 for lost profits. Held, that claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$8,000, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. It has been characterized here erroneously as an appeal from a decision of the Claims Board, Air Service.

3. On April 1, 1919, claimant company filed its statement of claim, Form A, with the Air Service Claims Board, and on May 12 the Claims Board, Air Service, passed upon the claim, and, among other things, found as follows:

“The board disallowed an item of \$8,000 shown as ‘cost of shutting down compounding department of plant and holding department.’ The basis of this item appeared to be prospective profits on colloid dope which might have been sold to the Basic Products Company had the claimant had the use of a certain mixer which it dismantled and intended to use on the production of diacetone alcohol. The board decided that the award in this case should permit the claimant to reserve his rights to submit a further claim with respect to this

matter to the Court of Claims." (Minutes of Claims Board, Air Service, May 12, 1919),

and on May 14 made an award to claimant company as follows:

"It appearing to the satisfaction of the Secretary of War that an agreement was entered into in good faith between the Alcohol Products Company, Newark, N. J., the claimant, and F. D. Schnacke, captain, A. S. A. P., an officer or agent acting under the authority, direction, or instruction of the Secretary of War, on or about the sixth day of November, 1918, during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, for a purpose connected with the prosecution of the war; that the agreement had been performed in whole or in part, or expenditures had been made or obligations incurred by the claimant, on the faith of such agreement, prior to November 12, 1918; that the agreement has not been executed in the manner prescribed by law; that the said agreement is within the provisions of the above-entitled act of Congress; that the nature, terms, and conditions of said agreement are set out in 'Form C,' certificate of Claims Board, Air Service Board, No. ASA 25, dated May 13, 1919, on file in the War Department; that the claimant presented his claim to the Secretary of War before June 30, 1919; that the sum of \$5,330.95 will adjust, pay, and discharge such agreement upon a fair and equitable basis, and that such sum will not include prospective or possible profits on any part of the agreement upon beyond the goods and supplies delivered to and accepted by the United States thereunder and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said agreement.

"The Secretary of War hereby awards to said claimant the sum of \$5,330.95 in full adjustment, payment, and discharge of said agreement; with right reserved the claimant to file suit in Court of Claims or other competent tribunal with reference to the item of 'Cost of shutting down compounding department of plant and holding department, \$8,000,' which is disallowed in this award."

The claimant company accepted the award as made, and signed the settlement contract under such award with the Secretary of War.

4. Thereafter, on June 26, 1919, apparently under the terms of the award "*with right reserved the claimant to file suit in Court of Claims or other competent tribunal*," claimant filed its petition with this Board for the sum of \$8,000, and alleged among other things that the claim was for cost of shutting down compounding department of plant and holding department.

5. Under this petition, this case is before this Board to be heard as a class B claim, and the Board finds the following to be the facts under it:

6. During the year 1918, from about August until after the signing of the armistice, claimant company was manufacturing colloid dope for the Basic Products Co. as an ingredient of solidified alcohol.

7. The Basic Products Co. was making for the United States Government solidified alcohol as a prime contractor, and the Alcohol Products Co. in furnishing the colloid dope to the Basic Products Co. was acting as a subcontractor of the Basic Products Co. on a Government contract for solidified alcohol.

8. The claimant herein, Alcohol Products Co., had no written contract with the Basic Products Co., but was acting simply under an oral agreement with the Basic Products Co.

"Mr. FOWLER. In regard to the alleged contract with the Basic Products Company, what evidence have you of this contract?"

"Mr. MASON. I think I am right in saying, as I look through the files, that we have no written, formal evidence as to the contract with the Basic Products Company which we had." (Tr., p. 37.)

"That prior to November 2, 1919, the Alcohol Products Co., of Newark, N. J., were manufacturing for Basic Products Co. under an oral contract, colloid dope." (Affidavit of J. P. Carter, treasurer and general manager of the Theroz Company, formerly Basic Products Co.)

9. On or about November 1, 1918, the Government through Lieut. James L. Dohr, in charge of chemical purchases for the Chief of the Procurement Division, Director of Aircraft Production, negotiated with claimant a contract which was afterwards duly executed with an authorized contracting officer of the Government under order No. 710665 for the production of 150,000 gallons of diacetone alcohol at a unit price of \$1.88 per gallon.

10. On November 20, 1918, claimant was notified to stop all production under order No. 710665, covering the 150,000 gallons of diacetone alcohol.

11. Claimant company in its petition contends:

"(b) This cost item was calculated and figured in the bid price of \$1.88 per gallon and was based on what the mixer (which was ready to operate on colloid dope for Basic Products Co.) was sure to net in profit during the time it would take to prosecute this order for diacetone alcohol."

And in the hearing before this Board, the claimant company, represented by Mr. J. Gilbert Mason, jr., manager, contended as follows:

"Lieut. Col. McKEEBY. * * * Now, your claim, as I read it, is for \$8,000 of prospective profits which you would have made out of this machinery, provided it had been used on the alleged contracts with the Basic Products Company.

"Mr. MASON. The Basic Products Company.

"Lieut. Col. McKEEBY. Am I right about that?"

"Mr. MASON. You are right on that, and the distinction in this case, as I view it, is the claim that we make that the prospective profits you mention now, and as referred to in the Dent Act are prospective profits on the material the subject of such a contract. I do not know whether you understand me on that, but the thing is based on what we would have done with that machinery on some other ma-

terial or in the making of some other material which we gave up at the solicitation of the Government, and that cost item was considered at the time the price was given to the Government. It was included as a cost item in these 150,000 gallons. That is the only contention." (Tr., pp. 5, 6.)

12. Claimant company contends that had it been allowed to proceed with its contract with the Basic Products Co. it would have made \$8,000, the amount of this claim, out of that contract.

"Mr. FOWLER. Now, I wish to bring out evidence with regard to the question of the necessity of shutting down that department. Why was it necessary to shut down the department?

"Mr. MASON. The whole department was not shut down.

"Mr. FOWLER. Why was it necessary to shut down to the extent of \$8,000, as claimed in your petition?

"Mr. MASON. Because the basis for that represented what that mixer was ~~sume~~ to make during the time we took it off in order to prosecute this Government order, under orders from the Government. The rest of our department was not shut down and we did not intend to give that impression." (Tr., p. 26.)

13. The claimant, Alcohol Products Co., was at all times a subcontractor on a Government contract that the Basic Products Co. had with the Government.

"Mr. FOWLER. The Alcohol Products Company was acting as a subcontractor on a Government contract.

"Mr. MASON. As I understand it, sir; yes, sir." (Tr., p. 41.)

14. The \$8,000, upon which this claim is based, is purely the prospective profit that the claimant company contends it would have made by reason of its subcontract with the Basic Products Co. had it been permitted to continue that contract.

"Mr. FOWLER. In other words, the position that you take is that the Alcohol Products Company had a sure profit of \$8,000 under a contract with the Basic Products Company and it gave up this \$8,000 in anticipation of the profit that would be made under the Government contract?

"Mr. MASON. Will you repeat that?

"Lt. Col. McKEEBy. Read the question to him.

"(The question was read as above recorded.)

"Mr. MASON. That did not refer to the first \$8,000 as the profit.

"Suppose you read it once again.

"(The question referred to was again read as above recorded.)

"Mr. MASON. As I understand the question; yes, sir.

"Mr. FOWLER. Then you are really asking the Government to give you \$8,000 of your anticipated profits under the Government contract on the ground that had the Government contract not been made you would have made that profit under the Basic Products Company's contract?

"Mr. MASON. Will you read that question?

"(The question referred to was read as above recorded.)

"Mr. MASON. We may be now asking that, but not in that sense. When we gave the bid price to manufacturers we included the cost item, which amounted to \$8,000, and that cost item was based on what that mixer was sure to do over a month's operation if it were used in diacetone alcohol." (Tr., pp. 45, 46.)

15. Claimant company in presenting its claim here, however, contends that the amount of its claim, i. e., \$8,000, was a part of its cost and was figured in in making the price of \$1.88 per gallon. The Government's contention, however, is that while this \$8,000 may have figured in the price of \$1.88 per gallon it is not a legitimate cost, and that if it was figured in, the source of this cost was not disclosed to Lieut. Dohr, the officer with whom the negotiations were conducted.

"Mr. FOWLER. What was your understanding of the basis upon which that price was arrived at?

"Mr. DOHR. My understanding of the basis upon which that was made was that it included the following items: Materials, labor, Alcohol Products Company factory overhead, which I was given to understand would include the cost of certain alterations in their plant, cost of securing certain patent rights, and profit to the Alcohol Products Company.

"Mr. FOWLER. Was an item of \$8,000 for loss on another contract, to wit, Basic Products Company's contract, brought to your attention?

"Mr. DOHR. I do not recall it.

"Mr. FOWLER. Then, that item did not figure in your estimate upon which you based the price?

"Mr. DOHR. I answer that question no; only I think it is fair to say that it does not show it was not in the price. It was not put in the price as such, to my knowledge.

"Mr. FOWLER. That is all I want to bring out.

"Lt. Col. McKEEBY. Do you desire to ask the witness any questions?

"Mr. MASON. Do you, Lt. Dohr, know every item on which the cost price of \$1.88 per gallon was based? Did Mr. Wynkoop show you each item as he made it up?

"Mr. DOHR. Mr. Wynkoop and I—I furnished the prices for the raw materials and Mr. Wynkoop secured them for me. Inasmuch as we were furnishing raw materials, I knew the prices better than he did. As far as raw materials were concerned, I put in the costs of raw materials. Mr. Wynkoop supplied the remaining figures—the company's charge for labor and overhead. I recall a figure of \$5,000 which was agreed upon by Mr. Wynkoop and the owner of the patent, who was in my office at that time, and Mr. Wynkoop supplied me with the figures of his profit.

"Mr. FOWLER. Did that check up to the full amount of the contract?

"Mr. DOHR. That checked up to the full price per gallon; yes, sir. It is only fair to state that the figures, if you want to work them out in building up the price, are such that an item of \$8,000 might have been

included by Mr. Wynkoop. There is room for them in his factory overhead and labor.

"Mr. MASON. You have no accurate knowledge that he did not figure that as a cost item?"

"Mr. DOHR. No." (Tr., pp. 47-49.)

DECISION.

1. This Board has only such jurisdiction as has the Secretary of War. The Secretary of War in the instant case has entered into a settlement contract with claimant company, and while the settlement contract and the award made by the Secretary of War reserves to the claimant the right to file a suit in the Court of Claims or other competent tribunal with reference to the subject of the claim here, this reservation only goes to either the Court of Claims or some other court having jurisdiction and does not give to the claimant the right to reopen the matter before the Secretary of War without his consent, which so far as the record discloses has not been obtained.

2. When the settlement contract was entered into and claimant accepted its award, the Secretary of War lost jurisdiction. As said by Col. J. R. Delafield, in Notes on Jurisdiction of the Secretary of War:

" * * * It will be noted, however, that this power of the Secretary of War to settle formal contracts by agreement with the contractor rests wholly upon the existence of the contract itself and can not be exercised where the contract has been fully executed by performance or terminated by breach. In such cases the powers and functions of the Secretary of War to amend the contract have ceased and the claims of the parties are merely for damages for some breach of the contract and can only be determined by a court having jurisdiction."

3. If, however, this reservation could be construed so as to give claimant the right to reopen its case before this Board or the Secretary of War, the act of March 2, 1919, under which the claim is filed before this Board, provides:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, * * * with any person, firm or corporation * * * for the production, manufacture, * * * of equipment, materials, or supplies, * * * for facilities, or other purposes connected with the prosecution of the war * * *: *Provided, That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract* * * *."

4. The claimant herein is basing its claim clearly upon the profits that it *might* have made, providing it had been allowed to continue delivering colloid dope to the Basic Products Co. This is clearly a prospective profit that a subcontractor *might* have made, providing it had been allowed to continue work for the prime contractor. Not only is it prospective, but it is also purely speculative, as the Alcohol Products Co., claimant herein, had nothing but an oral contract or working agreement with the Basic Products Co. The machine that they claim that the \$8,000 profit *might* have been made from, providing it had been allowed to work on the Basic Products Co.'s oral contract, had never been in use in the manufacture of colloid dope. (Tr., p. 20.) Therefore, it is mere speculation to say that the machine would have been connected up to do the work, that after it was connected up it would not have broken down, that the Basic Products Co. would not have canceled its order for further products of claimant company, and numerous other contingencies which make the alleged prospective profits on the contract with the Basic Products Co. purely and exclusively speculative.

5. The claim is, however, based upon a prospective profit that the claimant company expected to make out of a subcontract on a Government contract and is clearly within the proviso set forth in the act of March 2, 1919, forbidding the Secretary of War to pay prospective profits.

6. For the foregoing reasons, this Board is of the opinion that claimant is not entitled to recover.

DISPOSITION.

1. A final order denying relief will issue.

Col. Delafield and Lieut. Col. Carruth concurring.

Case No. 2300.

In re CLAIM OF FORD MOTOR CO. AND TAFT-PIERCE MANUFACTURING CO.

1. **WHERE AWARD NOT FINAL.**—Unless a final award by a bureau board to a contractor is made, an additional claim based on a claim of a subcontractor, which was overlooked in presenting previous claims, may be considered by a bureau board.
2. **MISTAKE IN STATEMENT OF PRIOR CLAIM NOT FATAL TO RECOVERY.**—There may be circumstances under which a claim based on a subcontract will not be barred although claimant may have stated in a former claim, filed with a claims board and allowed by it, that the amount thereon claimed represented full and complete payments to vendors and subcontractors and all claims that they may have against claimant on account of the contract upon which claim is based.
3. **ACT OF MARCH 2, 1919—REMEDIAL—SECRETARY OF WAR, PURPOSE OF.**—The act of March 2, 1919, is remedial in its nature, and the purpose of the Secretary of War in its administration is to do substantial justice.
4. **APPEALS, TIME OF.**—Although an appeal from a claims board may not be taken after 20 days, yet it will be considered by the Board of Contract Adjustment if taken within a reasonable time after the adverse decision by the bureau board.
5. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for items omitted from a previously adjusted claim. Held, under the circumstances of this case, the claim should be considered by the Air Service Claims Board.

Mr. Shirk writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Air Service Claims Board on a claim for \$2,611.67 on an informally executed contract under the circumstances stated below.

2. On May 1, 1919, the Air Service Claims Board found an informal agreement not executed in the manner prescribed by law with the Ford Motor Co. for the manufacture of 7,000 Liberty 12-cylinder engines, in addition to the 5,000 of such engines covered by contract No. 2129, upon an implied promise to pay a price therefor determined on the same basis as provided in said contract No. 2129 for 5,000 engines, which was a cost-plus contract; and that board issued its certificate, Form C, thereon. That finding was

made pursuant to the Ford Co.'s statement of claim, Form A, verified April 22, 1919, and presented under the act of March 2, 1919.

3. Pursuant thereto, the Air Service Claims Board, under date of May 1, 1919 (approved by the War Department Claims Board and accepted by the Ford Motor Co.), made an award to the Ford Co. of \$3,967,304.42 in partial settlement, the award containing the following provision:

"The extent to which this award is made with respect to any portion of the agreement which was sublet is as follows:

Said award does not include commitments to subcontractors which will later comprise separate claim."

4. On June 16, 1919, the Air Service Claims Board made a certificate in which reference was made to said award. The last sentence above quoted was recited and it was said further:

"Whereas it was not the sense of this Board to require the Ford Motor Company to file, nor was it the understanding of the claimant that he should file separate claim, as prescribed by Supply Circular 17, 1919, to cover commitments of subcontractors under said claim ASA-39.

"Now, therefore, it is hereby certified that the words 'separate claim' were intended, and shall be construed, to mean 'a certified statement or statements of commitments chargeable to the agreements established by the aforementioned Form C certificate;' and

"That said award Form 2, of May 1, 1919, was executed by the board with the understanding that payments to subcontractors should be covered by an additional award under said Form C certificate."

The Ford Co. presented an affidavit, verified June 23, 1919, reading in part as follows:

"Mr. B. J. Craig, being duly sworn deposes and says that he is an officer to wit: Secretary and assistant treasurer, of the Ford Motor Company; that the following commitments were entered into and the Ford Motor Company became obligated for the same for the purpose of executing the manufacture and delivery of seven thousand (7,000) motors, which work was the subject of your award A, claim ASA-39:

*	*	*	*	*	*	*
National Acme Co.....						113, 324. 99
Taft-Pierce Manufacturing Co.....						103, 295. 05
*	*	*	*	*	*	*

"That the above amounts represent full and complete payments to the vendors and subcontractors mentioned for any and all claims they may have against the Ford Motor Company on claim ASA-39; that each and every one of these commitments has been investigated, audited, and approved by representatives of the Air Service; and that the Ford Motor Company has paid the above vendors and subcontractors in the amount set opposite their names."

It was a fact as stated in said affidavit that the commitments mentioned had previously been investigated, audited, and approved for payment by representatives of the Air Service.

5. Thereafter, on June 27, 1919, the Claims Board of the Air Service made a second award to the Ford Co. of \$1,228,534.64 with respect to the following separable item:

"Payments to subvendors, as found on sheet one of attached supplemental claim in memorandum from assistant district manager, Air Service Finance."

That award further recites that it was not at that time possible to make a complete award with respect to the agreement, and continues:

"The Secretary of War hereby awards to said contractor the sum of \$1,226,534.64 in full adjustment, payment, and discharge of said item.

"The extent to which this award is made with respect to any portion of the agreement which was sublet is as follows:

"Commitments as set forth in memorandum of Captain T. D. Boole, assistant district manager Air Service Finance.

"Contractor has presented satisfactory evidence that said subcontractors have been paid by the prime contractors."

The said memorandum of Capt. Boole, referred to and attached to the papers, shows a commitment to Taft-Pierce Manufacturing Co., of \$103,293.05 and one to National Acme Co. of \$113,324.99. The second award mentioned was approved by the War Department Claims Board on July 1, 1919, but it does not appear from the papers submitted that it was accepted by the Ford Motor Co. However, the recorder of the Air Service Claims Board has stated to us informally that it was accepted by the Ford Co. on July 9, 1919.

6. It appears that in addition to the sum of \$103,293.05 for which the Ford Co. was committed to the Taft-Pierce Co. and the sum of \$113,324.99, for which the Ford Co. was committed to the National Acme Co., the National Acme Co. had an additional claim for \$2,611.67 against the Taft Co., which in turn claims that amount from the Ford Co., the prime contractor. It was the desire of the Ford Co., after the making of the second award, to have that sum included in the settlement by way of an additional award or otherwise. The Air Service Claims Board then refused to award that item, and the Ford Co. has appealed to this Board. The papers do not indicate that the Air Service Claims Board disputes the justice of this item, but rather the reverse, and its refusal to allow it appears to be based entirely upon its decision of August 5, 1919, not to reopen any settlements then already consummated.

7. The Ford Co. in its letters of August 11 and 12 state that this item of \$2,611.67 of the National Acme Co. was presented in proper form months prior thereto; that the papers were forwarded to the

Detroit aircraft district office for auditing, "where these papers, through oversight, became sidetracked, and as a result the official check of the Government was delayed until the middle of July, 1919," after the making of the second award above referred to. It is further stated that at the negotiations looking toward the second award Lieut. Gabrielson represented the Government, and that he disapproved of the said item of the National Acme Co. "for the sole reason that this claim had not yet been checked up by the Government accountants." It is further alleged that when Lieut. Gabrielson eliminated this item "it was mutually understood that Taft-Pierce were entitled to submit these charges as a 'supplementary claim.'"

DECISION.

1. We do not consider the question of whether or not this item of the National Acme Co. is a proper charge. All that we are concerned with is whether, assuming that it is a proper charge, the settlement should be reconsidered for the purpose of including it.

2. There is nothing in either award to indicate that they are final awards and in final settlement. In fact, the second award expressly states:

"That it is not at this time possible to make a complete award with respect to this agreement."

Moreover, that award expressly provides:

"The extent to which this award is made with respect to any portion of the agreement which was sublet is as follows:"—

and then refers to the item of \$103,293.05 to the Taft-Pierce Co. and the item of \$113,324.99 to the National Acme Co. This seems to imply that it does not purport to relate to any sums not included in those items. And the sum in question is not included. We think, therefore, that there is nothing on the face of the awards which would interfere with a further award of this sum if otherwise proper.

6. The question remains whether the settlement for this item is barred by the statement of the Ford Co. in its affidavit of June 23, 1919, in which it states:

"That the above amounts represent full and complete payments to the vendors and subcontractors mentioned for any and all claims they may have against the Ford Motor Company on Claim ASA-39."

Technically, we suppose that that statement would bar the Ford Co. from now urging the allowance of this item. However, the act of March 2, 1919, is remedial in its nature, and the purpose of the Secretary of War in administering it is to do substantial justice. Moreover, it is the intent of that act, as appears by section 4 thereof, that the Secretary of War shall guard the interests of subcon-

tractors. In view thereof and the understanding with Lieut. Gabrielson at the time of the negotiations that this item should be considered later and be allowed if proper, it is desirable that the parties be not estopped by the formal technical statement contained in that affidavit.

7. The Air Service Claims Board's refusal to reopen the matter was made on August 5, 1919. The Ford Co. then endeavored to get the Claims Board to reconsider its decision, which it finally refused to do in the latter part of September. The claimant's appeal was taken on November 5. In the circumstances, we do not think that its appeal is too late.

8. In the interest of substantial justice, which is the object to be attained, we see no reason why the claimant should not have settlement for this item if it is a proper charge in other respects. The Air Service Claims Board is hereby advised to reopen the matter and to consider this item, and if it appears to be a proper charge, to make a further award in the premises.

Col. Delafield and Mr. Williams concurring.

Case No. 2058.

In re **CLAIM OF SCHENECTADY FIREWORKS CO.**

1. **FACILITIES.**—Where claimant proceeded to equip its factory to manufacture 1,000 rockets a day at the request of a contracting officer, on the understanding that it would receive a contract which would amortize its expenses thus incurred, there was an express agreement within the terms of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim based upon an oral agreement relating to the manufacture of trench rockets. Held, claimant is entitled to relief.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Supply Circular No. 17, 1919, for the amount of \$648.75, by reason of an agreement alleged to have been entered into between claimant and the Secretary of War.

The claim is for expenses incurred by claimant in the performance of the alleged agreement, less certain allowances for salvage.

STATEMENT OF FACTS.

1. Claimant is a manufacturers of fireworks, with a factory at Schenectady, N. Y.

2. On October 28, 1918, at the request of Capt. J. P. Bell, trench warfare section, Ordnance Department, United States Army, Mr. F. L. Ryno, vice president of claimant company, had an interview at Washington with Capt. Bell, at which Capt. Bell requested claimant to undertake the manufacture of 150,000 trench rockets for the Ordnance Department. Capt. Bell requested claimant to proceed at once to put its factory in condition to manufacture 1,000 rockets a day at the earliest possible time, and promised claimant that when such capacity had been reached the Ordnance Department would give claimant contracts for 150,000 rockets at prices sufficient to amortize the expenses to be incurred by claimant in so preparing its factory for the 1,000 rockets a day capacity.

3. Claimant accepted Capt. Bell's proposal and proceeded to comply therewith, and in so doing and prior to November 12, 1918, incurred the expenses set out in the statement of claim, with the exception noted below. Claimant received a suspension notice from the

Government during the latter part of November, 1918, and stopped work. No contract for rockets was awarded claimant.

4. Captain Bell was an authorized contracting officer.

DECISION.

1. The proposal of Capt. Bell above set forth and its acceptance by Mr. Ryno on behalf of claimant constituted an express agreement under the terms of March 2, 1919.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

2. The item in claimant's statement of claim for expenses for F. L. Ryno and Albert E. Schwartz, secretary and treasurer, to Washington per request in telegram, dated October 24, 1918, in the sum of \$180.25, should not be allowed. This was not incurred on the faith of the agreement.

Col. Delafield and Mr. Harding concurring.

Case No. 2076.

In re CLAIM OF PARKER MANUFACTURING CO.

1. **GOVERNMENT CONTRACT WITH THE SUBCONTRACTOR.**—Where claimant was sent an order from a prime contractor with the Government which it refused on account of the price, and an authorized Government agent requested claimant to take the order and the Government would make it right with claimant, and claimant did take the order and perform the contract, there is an agreement between claimant and the Government whereby the Government should reimburse claimant for the cost in excess of the amount paid by the prime contractor.
2. **RECEIVING CHECK.**—In such case where the claimant receives and keeps but does not cash a conditional check sent it by the prime contractor, it is no bar to claimant's recovery from the Government for the excess.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$5,433.36, for the cost of forked end bolts in excess of the amount to be paid by a prime contractor, being an appeal from the Air Service Claims Board. Held, claimant is entitled to recover.

Mr. Harding writing the opinion of the Board.

This claim comes to us on appeal from a decision of the Air Service Claims Board, on a claim of \$5,433.36 on a class A claim, under the following circumstances:

FINDINGS OF FACT.

1. On September 18, 1918, the claimant received an order from the Swope-McCracken Co. for the manufacture of 10,000 forked end bolts at 14 cents each, and the Swope-McCracken Co. sent materials to the Parker Manufacturing Co. out of which to manufacture the bolts in question. After a conference between the parties, the Parker Manufacturing Co. declined the order on account of the price not being sufficient, and thereupon the Swope-McCracken Co. forbade the further use by the Parker Manufacturing Co. of the steel in its possession which the Swope-McCracken Co. had furnished. A representative of the Board of Aircraft Production, Mr. Fred Prothero, advised the Parker Manufacturing Co., the claimant, that these bolts were needed for airplane construction, and suggested that the claimant company proceed to manufacture them. Acting under this advice the claimant started on their manufacture, using the steel shipped by the Swope-McCracken Co. The Swope-McCracken Co. thereupon demanded the return of the steel, and the Parker Manufacturing Co. stopped the manufacture of the bolts.

2. Soon after this time a representative of the Bureau of Aircraft Production, one Mr. A. E. Tomes, instructed the Parker Manufacturing Co. to proceed with the manufacture of the bolts, using the steel furnished by the Swope-McCracken Co., and to deliver the bolts to the Swope-McCracken Co., advising the claimant that the Government would pay it for same on such basis as would allow a reasonable profit.

3. Claimant thereupon requested to be furnished with a letter confirming the agreement, and accordingly under date of October 9, 1918, the claimant was furnished with a letter signed "Detroit district production office, by direction Capt. J. Neal Patterson, A. S. A. P., per E. A. Tomes," reading as follows:

"Confirming conversation this afternoon please proceed without delay with order #6328 received by you from the Swope-McCracken Company of Detroit. Please furnish material in accordance with blue print, using the steel furnished by the above-mentioned concern, and furnish same in the condition which they request, i. e., without copper dipping.

"The price on this material is to be determined upon completion of the contract. The Signal Corps will send a competent accountant to your plant to make an audit of your books covering the above-mentioned subject.

"Speed is the essence of this contract and order should be completed without delay."

4. Parker Manufacturing Co., the claimant, produced and furnished the bolts to the Swope-McCracken Co., and later applied for payment to the Government but was instructed by the office, Bureau of Aircraft Production, Detroit, to bill bolts to Swope-McCracken Co., at 14 cents each, subject to adjustment of price. The claimant, Parker Manufacturing Co., did bill the bolts as instructed by the Bureau of Aircraft Production but reserved in the bills the right to readjustment of the price. The Swope-McCracken Co. offered a check in final settlement of the amount due the Parker Manufacturing Co., which the Parker Manufacturing Co. kept possession of but refused to accept as payment. The check is as follows:

[Peninsular State Bank. Clark, Emmons, Bryant, Klein & Brown, attorneys. No. 54823.]

1310-12 FORD BUILDING,
Detroit, Michigan, June 12, 1919.

Pay to the order of Parker Manufacturing Company (\$1,565.25) one thousand five hundred sixty-five dollars, twenty-five cents.

This check is not payable unless accompanied by garnishment release in case of *Pittsburgh Shafting Co. vs. Parker Mfg. Co.*, plaintiff. Swope-McCracken Company, garnishee, defendant.

By (sgd.) WM. G. BRYANT.

To the Peninsular State Bank, Detroit, Mich., 9-17.

The following is stamped across the face of this check:

"Certified June 12, 1919, Peninsular State Bank, B. H. Johnson, teller. Do not destroy the check."

The following indorsement appears on the back of the check:

"Received of Swope-McCracken Co. \$1,565.25 in full settlement of all claims and demands against that company growing out of contract covering machining of 10,000 forked end bolts as per order No. 6328, dated Sept. 28, 1918.

"(Sgd.)

PARKER MANUFACTURING COMPANY,
G. C. PARKER, *President.*"

and the check has not been cashed so far as the same appears from the files. The claimant consulted with officers of the Bureau of Aircraft Production relative to acceptance of the check and was advised that acceptance of the check would not prejudice any claim it might have against the United States. This understanding is evidenced in a letter dated June 14, 1919, signed by Capt. F. G. White, district manager Air Service Finance, Detroit, reading as follows:

"1. Upon consultation with the office, Mr. Gorham C. Parker, general manager of the Parker Manufacturing Co., has requested permission to file a claim pursuant to the provisions of the Dent law, growing out of the delivery to Swope-McCracken Company, of Detroit, Michigan, of forked end bolts for aircraft work, Signal Corps, C. S. O., with a reservation stated as follows:

"The acceptance of the sum of \$1,565.25 in part settlement of the claim of Parker Manufacturing Co., growing out of the delivery by Swope-McCracken Company, of Detroit, Michigan, of 10,000 forked end bolts, for aircraft work, Signal Corps, pursuant to instructions received from Captain Patterson, does not prohibit the Parker Manufacturing Company, Ann Arbor, Michigan, from filing additional claim for remuneration under the terms and provisions of the Dent law, it being intended that by the filing of such claim for remuneration under the terms and provisions of the Dent law the said Parker Manufacturing Co. is in nowise to be construed as barred or in any way prejudiced on account of the acceptance of such part payment by the Swope-McCracken Company."

"Permission to file claim with reservation as above stated is hereby granted to the Parker Manufacturing Company."

5. On the state of facts as above set forth the majority of the members of the Air Service Claims Board found that a class A claim existed but that no award could be made, inasmuch as the claimant had made a settlement with the Swope-McCracken Co., thus relieving the Government. From this conclusion two members of the Board vigorously dissented.

The Swope-McCracken Co. appears somewhat in the nature of a broker, furnishing the Government with bolts and other material which it was accustomed to have manufactured by different manufacturers in different places.

DECISION.

1. It seems to be admitted on all sides that there was a valid contract entered into between the claimant and the United States by which the claimant agreed to furnish to Swope-McCracken Co. for the Government 10,000 forked-end bolts, and that it should bill them to the Swope-McCracken Co. at 14 cents, and that the United States agreed on its part that the 14 cents at which the claimant billed them should not be a fixed price, but that the Government would audit the account of the Parker Manufacturing Co., the claimant, and allow to that company a sum for the bolts sufficient to compensate it for their manufacture and to allow for a reasonable profit. So far as the parties representing the Government, including the Air Service Board, are concerned, this contract seems to be admitted; and in this conclusion we agree. The only matter in question is whether or not the receipt by the claimant of the check (item 4, findings of fact) was a settlement of the indebtedness so as to relieve both the Swope-McCracken Co. and the Government from a settlement of the account in the manner agreed upon.

The Claims Board, Air Service, found that there was a contract, but were of the opinion that all amounts due under it were settled by the check in question. We agree that there was a contract, but there is no theory which can be advanced under which the check in question can be held to be an accord and satisfaction even as between Parker Manufacturing Co. and the Swope-McCracken Co., so far as the same affects the Government. Upon examining the check, it will be found that it is a conditional payment, and is not payable unless accompanied by a garnishment release, etc. In other words, it leaves something to be done by the payee in the check after its receipt and before it would be paid by the bank upon which it was drawn. Such a check can not be a payment or be construed as a payment until the things required of it are done and the cash paid upon the check. It is a general rule of law that a check sent in payment of a debt is payment or not payment, according as both parties consider it. Sometimes the payee's acceptance as payment is inferred from his having cashed the check. In this case the check has not been cashed, but has been held subject to adjustment of all matters, especially an adjustment with the Government of the United States, leaving it to deal with the Swope-McCracken Co. according to the circumstances of the case as it may be advised. The Government of the United States is in no way prejudiced by this check as to its rights against anybody.

"Defendant being indebted to plaintiff, sent his check to the latter, expressing in terms on its face that it was 'in full.' The check was for less than the debt and was neither presented nor

returned until tendered back at the trial. Defendant suffered no loss by reason of plaintiff's failure to present the check. The check was not payment in full nor *pro tanto*." (*Flynn v. Woolsey*, 57 Hun., 590; 10 N. Y. Supp., 875.)

This is the general rule of law and it would be idle to quote the many authorities on the subject. The claimant is entitled to be paid the amount of the check in question and an additional amount equal to the difference between the amount for which it holds the check of Swope-McCracken Co. and the amount which will be found due from the Government by an investigation by competent accountants as a fair and reasonable price for the furnishing of 10,000 forked end bolts (not to include the excess bolts over 10,000, if any delivered).

DISPOSITION.

This Board will formulate a document setting forth the nature, terms, and conditions of the agreement between the claimant, Parker Manufacturing Co., and the United States, and will execute its certificate, Form C, as prescribed in Supply Circular No. 17, revised on March 26, 1919, and send the same to the Air Service Claims Board for appropriate action.

Col. Delafield and Mr. Howe concurring.

Case No. 424.

In re CLAIM OF BRADDOCK MANUFACTURING CO.

1. **REFORMATION—PROXY-SIGNED CONTRACT.**—Where, through a mutual mistake, a proxy-signed contract does not correspond to the real agreement of the parties, it will be reformed, even though the contract has been fully performed, and compensation has been received by the contractor.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$51,825.36, the difference between the tentative price and the agreed price. Held, claimant is entitled to recover.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$51,825.36, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. The claim was approved by the Pittsburgh District Claims Board and came to the Claims Board, Ordnance Department, at Washington, on May 24, 1919, for approval of a statutory award.
3. On June 4, 1919, the Claims Board, Ordnance Department, referred the matter to the Board of Contract Adjustment, under General Order 103, for review and an opinion as to whether, upon the evidence submitted, the Board would find the existence of a Class B agreement, under the Dent Act, covering the compensation claimed by the claimant.
4. On July 31, 1919, the Board of Contract Adjustment rendered an opinion to the Claims Board, Ordnance Department, that the evidence contained in the file submitted was not sufficient to establish a contract under the act of March 2, 1919, and that no statutory award should issue to the claimant. The opinion of the Board is reported in Decisions of the War Department, Board of Contract Adjustment, volume 1, page 232.
5. On August 8, 1919, the claimant made application for a review and rehearing which was granted August 15, 1919, on the ground that the claimant had not been represented before the Board while the matter was under consideration. The claimant was also given

leave to file an appeal from the action of the claims board denying their claim.

6. On October 8, 1919, the claimant filed a statement of claim, Form B, under the Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$51,825.36.

7. A hearing was had in the matter on November 3, 1919, at which the claimant was represented by counsel.

8. On May 3, 1918, the claimant entered into a written contract with the Government for the manufacture of 5,000 tons of 9.2 cast-steel ingots. The contract purported to be made in the name of Samuel McRoberts, colonel, Ordnance Department, but was signed Samuel McRoberts, colonel, Ordnance Department, by R. P. Lamont, lieutenant colonel. It was what is known as a proxy-signed contract and, therefore, an informal contract under the provisions of the act of March 2, 1919.

9. The provisions as to the price to be paid by the United States were as follows:

"The United States will pay to the contractor, as a just and fair compensation, the sum of four dollars (\$4) per hundred pounds, f. o. b. cars Pittsburgh, Pennsylvania, delivered to and accepted by the United States * * *."

10. The claim is founded on the allegation that the price of \$4 per hundred pounds was intended by the company and by the Government official with whom negotiations were had, as a tentative price, and that the agreement of the parties was that the actual price should be such as should subsequently be established by the Price Fixing Committee of the War Industries Board as the price for the kind of commodities covered by the contract.

11. W. Marshall McCleary, who was called as a witness by the claimant, testified that at the time the contract with the claimant was entered into he was a captain in the Ordnance Department of the War Department, Procurement Division, and chief of the ferrous raw material section, and that he carried on the negotiations for the Government with Robert W. Tener, treasurer of the claimant company, which resulted in the contract in question.

12. At the time the contract was entered into, the Price Fixing Committee of the War Industries Board had not fixed a definite price per ton for acid steel, of which the ingots in question were to be made, but had fixed a price for rolled steel at 4 cents. The cost of manufacturing the ingots out of acid steel was greater than the cost of manufacturing them out of rolled steel. The Price Fixing Committee had under consideration the fixing of the price for acid steel. This was known to both Maj. McCleary and Mr. Tener.

13. At the interview at which the terms of the contract were agreed upon, Mr. Tener complained to Mr. McCleary that the price of 4 cents was too low, and it was mutually agreed between them that 4 cents should be used as a base price in the contract, it being necessary to have some price named in the contract, and that upon issuance by the Price Fixing Committee of a definite price for acid steel, such price should be paid by the United States instead of the price actually named in the contract, and whether the same were higher or lower than the contract price.

14. It further appeared that both witnesses understood that the Government and the contractor would be bound by whatever price was set by the Price Fixing Committee, irrespective of the contract price, and that they did not consider it necessary to put into the contract specific words to provide that the contract price should be made to conform to the price fixed by the Price Fixing Committee.

15. The claimant proceeded with the performance of its contract, manufactured the steel ingots described therein, delivered the same to the Government, and was paid at the rate of \$4 per hundred pounds. The full amount of steel provided for in the contract had been manufactured and delivered on September 21, 1918.

16. At a meeting of the Price-Fixing Committee held September 23, 1918, the price of cast-steel ingots was fixed at \$4.50 per hundred pounds f. o. b. cars Pittsburg basis; this price to apply on all cast steel ingots or slugs for projectiles delivered after January 1, 1918, under contracts with the United States.

17. The present claim is for the difference between the price of \$4 per hundred pounds received by the claimant and the sum it would have received at \$4.50 per hundred pounds, to which it claims it is entitled.

18. It further appears that the Pittsburgh district ordnance board claims against the Braddock Manufacturing Co. that the sum of \$12,189.41 is due to the Government on account of materials delivered under this contract but rejected for defects. This amount is figured on rejected steel at \$4.50 per hundred pounds. This claim was before the district Board on or about May 9, 1919, and the claimant agreed to such reduction from its claim in connection with a proposed settlement of said Board. Apart from the foregoing, no evidence has been taken as to the validity of the claim of the Government.

DECISION.

1. The claimant's contract was a proxy-signed contract and this claim is properly before this Board as a question under General Orders, No. 103 of 1918, on a class A claim under the act of March 2, 1919.

2. The relief which the claimant is seeking amounts to a request for reformation of its written contract on the ground that, by mutual mistake, the written contract does not express the real agreement of the parties.

3. The contract was negotiated on behalf of the Government by an officer in the Procurement Division not having statutory authority to enter into a written contract with the claimant. While Capt. McCleary had not the power to affix the signature of the Government to a written contract, it was within his duty as a member of the Procurement Division to make and determine upon the details of contracts which were subsequently reduced to writing in accordance with statutory requirements. It has been held in numerous decisions of this Board that a definite agreement entered into by an officer of the Procurement Division, although not a "contracting officer," is an agreement made under the authority and direction of the Secretary of War within the meaning of the act of March 2, 1919.

4. In a proceeding for reformation of a Government contract on account of mistake, the evidence does not have to conform to the provisions of Revised Statutes, section 3744. Parol evidence may be offered. (*Ackerlin v. U. S.*, 240 U. S., 531.)

5. The reformation, on the ground of a mutual mistake, of a written contract solemnly entered into, should be undertaken only upon the clearest evidence that such a mistake exists. (*U. S. v. Milliken*, 202 U. S., 168.)

6. The oral agreement which the written agreement was intended to express is clearly proved in this case. The mutual intent of the parties was that the contract price should be the price subsequently to be fixed by the Price Fixing Committee. This proved to be \$4.50 per 100 pounds.

7. The mistake in the present case arose from the belief of both parties that the price fixed by the Price Fixing Committee would govern in the settlement between the claimant and the Government, irrespective of the price set in the contract itself. This may be said to be a mistake of law. Much law has been written discussing the relative merits of mistakes of law and mistakes of fact as grounds for reformation of contracts. The courts of the United States, however, have adopted a liberal policy in dealing with questions of this kind and have justified the reformation of instruments on account of mistakes of law as well as on account of mistakes of fact. See cases cited *infra*.

8. In the present case the contract was drafted by Government agents, and the claimant relied upon the statement of another Government agent that the language would carry out the intent of their mutual understanding. We do not intend to impute anything in

the nature of bad faith to any Government agent in connection with this matter. The evidence, on the other hand, is clear that everybody has acted in good faith. Nevertheless, under the doctrine laid down in our courts, parties in some cases have a right to rely on the greater experience of the other party to the contract when the latter is more accustomed to deal with the subject matter of contracts of a technical nature.

9. In the case of *Snell v. Atlantic Insurance Co.* (98 U. S., 85; 25 L. ed., 52), a contract of insurance was re-formed so as to protect the interests of two persons whose names did not appear in the original policy by the insertion of their names therein. The error arose in this case from the mistaken idea that the insertion of the name of one partner in a policy would protect the interests of all three partners. The court held that the insured had the right to rely on the statements of the insurance agent to that effect, although such statements were in no way made in bad faith, but only by error of the agent.

10. In the case of the *Philippine Sugar Co. v. Philippines* (247 U. S., 348; 62 L. ed., 1177), a deed was re-formed against the interests of the United States so as to except the buildings on certain lands conveyed. (See also *Griswold v. Hazzard*, 141 U. S., 260.)

11. The case of *Cramp & Son v. U. S.* (239 U. S., 221; 60 L. ed., 238), is not contrary to the doctrine laid down, for it was not made out to the satisfaction of the court in that case that the mistake existed.

12. We are satisfied that the written agreement does not express the intent of the parties and that this was due to a mistake such that the claimant would be entitled, in a court of equity, to re-formation of its contract.

13. The Board of Contract Adjustment is not a court of equity. It exercises only certain powers granted by Congress to the Secretary of War and by him delegated to the Board. The question raised by a petition of this kind is, therefore, whether the Secretary can, by agreement with the contractor, exercise the right of re-forming a contract entered into by him, through his agents, where the circumstances are such that a court of equity would require re-formation in a case properly brought before it.

14. It has been held that the Secretary of War can not amend a contract after it has been fully performed. (*Corliss Steam Engine Co. v. U. S.*, 91 U. S., 321.) This case relates, however, to an amendment to the contract which changed the mutual rights of the parties. A reformation of a contract is on the other hand merely a correction of an error. It does not change the mutual rights of the parties as they were intended to exist, but recites them with greater accuracy.

15. The act of reforming a contract is not, accurately speaking, an amendment thereof, although it may be that it can be carried into effect only by a document having the form of an amendment. It is in fact merely the proper performance of a ministerial duty; that is, the reducing to writing of an agreement. We believe that the Secretary and, therefore, this Board as his agent, have the right to redraft the contract between the Government and the claimant so that it shall recite the agreement as made.

16. It appears that the Government has a claim against the claimant under the contract now under consideration. This claim has not been referred to this Board but is within the jurisdiction of another department of the War Department. This Board will therefore execute certificate C, amending the original contract, and will refer the matter to the Ordnance Claims Board for determination of the amount due after proper offsets and countercharges, and for final settlement of accounts as between the claimant and the Government.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C, to the Ordnance Claims Board for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield, Lieut. Col. Junkin, and Mr. McCandless concurring.

Case No. 619.

In re **CLAIM OF COUCH BROS. MANUFACTURING CO.**

- 1. FACILITIES—NO AGREEMENT.**—In the absence of an agreement, express or implied, no relief can be awarded under the act of March 2, 1919.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral agreement relating to building and equipping an addition to claimant's dye plant. Held, claimant is not entitled to relief.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim was presented informally by a letter addressed to the Board under date of June 25, 1919. The claimant seeks an allowance of \$21,232.47, the cost of an addition to its dye plant.
2. A hearing was had on January 13, 1920, before this Board, and, the claimant failing to appear, a further hearing was had on January 31. Again the claimant failed to appear.
3. The claim sets forth that the claimant was advised by various officers of the Quartermaster Department that the Government would give contracts to the limit of the capacity of the plant.
4. The testimony of four Government witnesses who negotiated contracts with the claimant during 1918 shows that no one of them encouraged or even suggested any increase in claimant's facilities, the Government having no need for such increase.

DECISION.

No evidence was produced of any contract, express or implied, between the Government and the claimant for the increase of the latter's facilities.

DISPOSITION.

An order will issue from this Board denying relief.
Col. Delafield and Mr. Hunt concurring.

Case No. 673.

In re **CLAIM OF ADAMS WOOLEN MILLS (INC.).**

- 1. EXPENDITURES IN ANTICIPATION OF CONTRACT.**—In the absence of an agreement claimant is not entitled to reimbursement for expenditures made in anticipation of obtaining a contract. Notice that the award of a contract had been recommended does not amount to an agreement.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an alleged agreement for the manufacture of olive drab Army blankets. Held, claimant is not entitled to relief.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$3,125.12, by reason of an agreement alleged to have been entered into between the claimant and the United States on or about November 5, 1918.

2. The claimant submitted bids for the manufacture of 40,000 four-pound olive drab Army blankets, at \$7 each, on or about October 24, 1918, to the Clothing and Equipage Division. On November 5, 1918, the claimant received the following telegram from said division:

“Contract will be recommended 18,000 blankets \$7 in accordance your bid October 28.”

On November 6, 1918, the Clothing and Equipage Division sent the claimant the following telegram:

“Referring to telegram from woolens branch, dated November 5, instructions from Washington necessitate reduction in quantity of blankets to what you can deliver by end of February. Please wire quantity.”

On November 7, 1918, the claimant replied to the foregoing telegram as follows:

“In reply to your telegram received this morning we would advise you that we have just wired you that we will deliver 18,000 blankets by February 28, 1919, which we hereby confirm.

“We will make the first shipment of 3,000 blankets on this order on January 25 and 3,000 blankets on February 1st, 8, 15, 22, and 28.”

On November 12, 1918, the Clothing and Equipage Division sent the claimant the following telegram:

"Supplementing telegrams November 5 and 6, conditions are so uncertain that you are advised to make no preparations for blanket manufacture until you actually receive contract papers."

3. The claimant alleges that it incurred obligations upon the faith of said alleged agreement prior to November 12, 1918, for materials necessary to fulfill said alleged agreement and has sustained losses because of the reduced market value of said materials and submits bills for sums paid therefor as follows:

Nov. 22, 1918, invoice of Shirley Mills for 10,288 lbs. coarse		
dark merinoes, @ 32c-----	\$3,292.16	
On which an allowance is asked of 35%, or-----		\$1,152.26
Nov. 27, 1918, invoice Shirley Mills for 8,012 lbs. coarse		
dark merinoes, @ 32¢-----	2,563.84	
On which an allowance is asked of 35%, or-----		897.34
Nov. 4, 1918, invoice George R. Whiting for 6,047 lbs.		
carded No. 2 C. D. merinoes, @ 34½¢-----	2,086.22	
On which an allowance is asked of 35%, or-----		730.18
Making a total allowance asked-----		2,779.78

At the hearing the claimant withdrew the last item of its claim of \$345.44, 25 per cent of the value of worsted suiting allotted by the Government (p. 10).

4. The evidence shows the materials for which the claimant asks reimbursement were ordered by it on the following dates:

October 24, 1918, 20,000 pounds coarse dark merino from Shirley Mills.

November 4, 1918, 10,000 pounds coarse dark merino from Shirley Mills.

November 4, 1918, 10,000 pounds C. D. merino shoddy from George R. Whiting.

5. On November 1, 1918, the woolens branch, Clothing and Equipage Division of the Quartermaster General's Office, New York, wrote the claimant as follows:

"In case a contract should be awarded you on O. D. blankets in accordance with your bid of October 28, 1918, advance information is desired of the total weight you will require, approximately, of each kind of stock your propose using in the required 50% of reworked wool:

"Your own shoddy, lbs.

"Government O. D. clips, lbs.

"Waste.

"Noils."

In reply to this letter the claimant wrote the Clothing and Equipage Division as follows:

"In reply to yours of November 1st we would advise you that, in case contract should be awarded us on the O. D. blankets in accordance with our bid of October 28, 1918, the approximate total weight of each kind of stock we propose using in the required 50% reworked wool is as follows:

"54,000 lbs. of our own shoddy

"54,000 lbs. O. D. Government clips.
on the $\frac{2}{3}$ overcoating and $\frac{1}{3}$ worsted basis."

6. Edward A. MacPeck, formerly treasurer of the claimant, was asked at the hearing whether the wool on which loss is claimed was not ordered for a contract other than the one under which he claims. He said he could not answer "that might be true" (p. 21). Referring to the order of October 24, 1918, for 20,000 pounds of wool, he said (p. 54): "I do not think that order applied on this contract."

When asked how he explained the fact that the two other purchases of wool, on which he now claims, were made on November 4, 1918, while his alleged agreement was on November 5, 1918, he said he could give no explanation except that he thought the claimant's president, Mr. Graham, since deceased, had a telephone talk advising him of the order on November 4, 1918 (p. 54). After the hearing he made inquiries relating to said telephone talk of Mr. Graham, and wrote this Board, January 27, 1920, that he was unable to obtain further information as to whether Mr. Graham had said telephone conversation.

7. Herbert Heston, procurement officer in the woolens branch, Clothing and Equipage Division of the Ordnance Department, testified that the demand for blankets was great early in November, 1918, but under the custom of the office at that time a recommendation was not equivalent to a notice that the contractor should proceed with the work; that such notices of a recommendation "gave them an idea that they would probably have more blankets to make."

8. Since the hearing the claimant has submitted the affidavit of David L. Jubb, former purchasing agent of the claimant, in which he states that in other contracts with the Government the claimant was urged to expedite deliveries, and that it was the custom of the claimant to prepare for manufacture "as soon as advised of the award." He submits copies of letters showing prior orders on which work was commenced before the written contract was received by claimant. The said letters show that positive advance notice in said prior cases was given by the Government, such as "Confirmation (amount and price), delivery at once," or "Contract approved." He states no instance of such a notice as "Contract recommended."

DECISION.

1. The statement in the telegram of November 5, 1918, to the claimant, "Contract will be recommended 18,000 blankets," was not an acceptance of a part of claimant's previous bid. In the claimant's letter of November 5, 1918, it states, "In case contract should be awarded to us on the O. D. blankets in accordance with our bid," etc. It, therefore, knew on November 5, 1918, that it had no award.

2. All the wool on which a loss was claimed was ordered by claimant previous to November 5, 1918. The item of 20,000 pounds ordered October 24, 1918, the claimant's witness stated was ordered for a contract other than the alleged one before us. The remaining two items of wool the same witness stated *may* have been ordered for other contracts.

3. The claimant has submitted evidence of its previous custom to proceed with the manufacture "as soon as it was advised of the award," but in this case it was not advised of an award. It was only advised of a recommendation.

4. We can not find that the claimant sustained any loss because of its interpretation of the recommendation of November 5, 1918. It had made its commitments for the wool on which loss is claimed prior to November 5, 1918. The situation remained unchanged until the claimant was advised on November 11, 1918, that conditions were uncertain and to make no preparations until it actually received contract papers.

5. We find no agreement was made with the claimant within the provisions of the act of March 2, 1919.

Col. Delafield and Mr. Smith concurring.

Case No. 394.

In re CLAIM OF NIAN TIC MANUFACTURING CO.

1. **ANTICIPATING CONTRACT.**—Where claimant, who had completed two Government contracts for the manufacture of blankets, purchased shoddy to be used in the manufacture of blankets in anticipation of Government contracts and had such shoddy on hand when it submitted a bid for an additional contract, and is informed that its acceptance has been recommended, but the bid is not formally accepted, and no contract is entered into nor orders issued for blankets to claimant, and claimant had made expenditures or incurred obligations, when on November 11 claimant received further instructions not to make any preparations to perform, claimant is not entitled to an adjustment.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for losses on shoddy purchased several months before claimant submitted a bid for the manufacture of blankets. Held, claimant is not entitled to an adjustment.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$3,756.70 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant seeks reimbursement of losses sustained by reason of the purchase of 37,567 pounds of reworked wool, or "shoddy," as it was called, with which to manufacture blankets for the Government. It alleges that it has sustained a loss of 10 cents a pound on 37,567 pounds of shoddy.

3. On or about October 28, 1918, in response to advertisements, the claimant, Niantic Manufacturing Co., submitted a bid to the woolen branch, Clothing and Equipage Division, office of the Quartermaster General, New York, to make 23,000 blankets at \$7 apiece, deliveries to be made in January, February, March, and April, 1918.

The contractor had the option to furnish the "shoddy" himself, or obtain from the Government "clips" from which shoddy was to be made. This shoddy went into the manufacture of blankets, and

was used in about equal parts with pure wool, which the Government would authorize the contractor to purchase after an order for blankets was given.

4. On October 29, 1918, Capt. Claude H. Ketchum, Quartermaster Corps, of the wool top and yarn subdivision, office of the Acting Quartermaster General, New York, wrote the claimant as follows:

"1. This subdivision has been informed that yesterday you bid on a blanket contract.

"2. If the woolens branch notify you that they have recommended that a contract be awarded to you, you are requested to fill out the enclosed forms in duplicate, applying for the necessary wool, and mail them to this office.

"3. It will not be necessary for you to wait until you receive the contract number, as this would probably take several days after the recommendation. On our forms leave the contract number blank and we will fill it in later."

Four or five days after submitting its bid, claimant's selling agent was informed by Mr. George C. Hetzel, chief of the woolens branch, Clothing and Equipment Division, office of the Quartermaster General, New York, that claimant had been recommended for a contract.

5. On November 5, 6, and 11, respectively, there was sent to claimant, from the office of the Quartermaster General, New York, the following telegrams:

"Contract will be recommended twenty three thousand blankets seven dollars in accordance your bid October twenty eighth."

"Referring to telegram from woolens branch dated November 5th, instructions from Washington necessitate reduction in quantity of blankets to what you can deliver by end of February. Please wire quantity."

"Supplementing telegrams of November fifth and sixth conditions are so uncertain that you are advised to make no preparations for blanket manufacture until you actually receive contract papers."

6. On May 29, 1918, the claimant placed an order with T. H. Gray & Co. for 60,000 pounds of khaki shoddy at 50 cents a pound. Of this order the claimant now still has on hand 12,298 pounds, 10,971 pounds of which was shipped by T. H. Gray & Co. after November 11. On July 6, 1918, the claimant placed an order with the firm of Smith & Cooley for 20,000 pounds of shoddy at 47 cents a pound, and on July 11, 1918, a further order of 30,000 pounds, making a total of 50,000 pounds of shoddy. Of this order the claimant still has on hand 25,269 pounds of shoddy, of which 10,351 pounds was shipped by Smith & Cooley after November 11.

7. Between October 28, when claimant submitted its bid, and November 11, when it received notice not to make preparations for the manufacture of blankets, the claimant did not make any disburse-

ments or incur any expenses. It never received contract papers; it never started production; and it never did anything after submitting its bid.

8. The claimant had manufactured large quantities of blankets under four previous formal contracts, which called for a total aggregate production of 101,000 blankets. Of these contracts, only one contract for blankets remained unfulfilled at the date of the signing of the armistice. The contract, however, has been completed and the claimant has been paid in full on it, so none of the prior contracts affect this claim.

The claimant, however, contends that, owing to the practice of the Government to award it contracts for blankets, it assumed that future contracts would be forthcoming, and so it purchased shoddy in advance of obtaining other orders, so that it might be prepared to fill the orders when given. At the hearing the claimant's superintendent, Mr. George H. Bathgate, with all frankness stated that he considered this claim would be just as good if he had not had this contract for 23,000 blankets. He then said:

"I am not claiming I purchased any shoddy for that specific contract (for 23,000 blankets). I am just claiming that we ran for over a year on Government work, and we went to it * * *. Took a chance to benefit on a lower price of shoddy."

DECISION.

1. In May and July, 1918, the claimant purchased an aggregate quantity of 50,000 pounds of "shoddy," which is a reworked material made from clippings, and is used in the manufacture of blankets. When these purchases were made, the claimant had completed two contracts with the Government for the manufacture of blankets and had two other uncompleted contracts for blankets, one of which called for deliveries monthly up to July, 1918, and the other called for deliveries from August to December, 1918. The aggregate total of blankets required to be manufactured under these four contracts was 101,000 blankets. As all four of the above-mentioned contracts were completed to the satisfaction of the Government and the claimant has been paid for the blanket supplies under them, these four contracts have no bearing on this claim, except to show the course of dealing with the Government and claimant's expectancy that it would receive future orders, so as to be able to utilize the entire amount of shoddy which it had purchased. The claimant has still on hand 37,567 pounds of shoddy of the amount purchased in May and July, 1918, and now seeks reimbursement on the basis of 10 cents a pound by reason of said purchases.

2. On October 28, 1918, the claimant submitted a bid to the office of the Quartermaster General, New York, to make 23,000 blankets

at \$7 each, deliveries to be made in January, February, March, and April, 1918.

On October 29 the wool top and yarn subdivision of the Quartermaster General's office wrote the claimant that if the woolens branch of that office notified claimant that it had been recommended for an award of a contract, the claimant should apply to the Government for the necessary wool without waiting until it received the contract number.

On November 5 the claimant was notified by telegram that it had been recommended for an award of a contract for 23,000 blankets in accordance with its bid.

On November 11 a telegram was sent the claimant directing it to make no preparations for blanket manufacture until it actually received contract papers.

No contract papers were received by the claimant. It did no work under the proposed contract, or in preparation therefor. It did nothing after submitting its bid on October 28 until it received notice of recommendation for an award on November 5, except to "wait for the contract," nor did it make any further preparations thereafter for the contract.

At the hearing specific inquiry was made whether the claimant made any expenses or contracted any obligations after it submitted its bid on October 28, but the claimant's representative asserted that none were made.

3. The act of March 2, 1919, authorizes the settlement of agreements entered into for war purposes prior to November 12, 1918, "when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same * * * prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law."

The statute does not permit the allowance of a claim unless some expenditures have been made or obligations incurred *on faith of the agreement* prior to November 12, 1918. Unless it is shown that some expense has been made or obligation has been incurred prior to November 12, 1918, as a result of the agreement, the statutory jurisdictional test is not satisfied, and there is no authority in the present law to authorize reimbursement of losses suffered.

4. In the present case the claimant never obtained the contract which it sought. It bid on October 28. It was notified on November 5 that it had been recommended for an award of a contract. It was notified on November 11 not to make any preparations for blanket manufacture until it actually received contract papers. It did not receive the contract papers referred to.

Between the dates mentioned and prior to November 12, 1918, the claimant incurred no expense, contracted no obligations, and did nothing toward the performance or in preparation to perform the contract. With perfect frankness, the claimant's representative testified that he considered the claim would be exactly as good if the contract which he sought did not enter into the case. This is true because all the shoddy, for which claimant now seeks reimbursement, was purchased four months before the claimant submitted its bid for this contract. The claimant has not shown, nor does it contend, that it has incurred any other obligations or expenditures.

5. Because the alleged agreement relied on in this case was not performed in whole or in part prior to November 12, 1918, and because the claimant has not made any expenditures or incurred any obligations prior to said date, as a result of the alleged agreement, this Board is without jurisdiction to grant the relief prayed for.

6. For the reasons stated, the relief sought for is denied.

Col. Delafield and Maj. Taylor concurring.

Case No. 1571.

In re CLAIM OF HARRISON RADIATOR CORPORATION.

1. **RIGHTS OF SUBCONTRACTOR.**—Where the prime contract has been fully performed, a subcontractor has no right, under the act of March 2, 1919, to file a claim against the Government based upon its contract with the prime contractor.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, by a subcontractor based upon a subcontract for the manufacture of 25 airplane radiators. Claimant had no dealings whatever with the Government and the prime contract has been fully performed. Held, claimant is not entitled to relief under the act.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. It comes to this Board as an appeal from a decision of the Claims Board, Air Service, disallowing a claim for \$10,731.72. Statement of claim, Form B, was filed with said Claims Board on June 6, 1919, and by said Board forwarded to this Board and received on July 17, 1919.

2. No hearing appears to be necessary in this case as we shall assume for the purposes of the decision that the facts are in accordance with the statements contained in the affidavits and letters submitted by the claimant.

3. On May 28, 1918, the Packard Motor Car Co., which was then negotiating for a contract with the Government for the construction of airplanes, wired to the claimant to quote a price on 50 radiators to be used in the engines. On the same day the claimant replied quoting a price of \$350 each.

4. On June 24, 1918, the Packard Motor Car. Co. placed an order for 25 radiators with the claimant, at \$350 each. The order contained the provision:

“We will receive this material subject to our inspection; and if it is not in accordance with our specifications or is in any way defective, it will be returned at your expense. * * *

“By acceptance of this order the seller accepts the above conditions” * * *

5. The claimant accepted the order and proceeded to manufacture the radiators.

6. Under date of August 20, 1918, the Packard Motor Car Co. entered into a contract with the Government for the manufacture of

25 planes. This contract was subsequently completed and the Packard Motor Car Co. received the amount due it thereunder.

7. The claimant delivered to the Packard Motor Car Co. 17 radiators and was paid for the same.

8. On October 28, 1918, the Packard Motor Car Co. wrote to the claimant:

"We respectfully request that you arrange to make cancellation of the balance of radiators due on our purchase order S-2409. We find this action necessary on account of the great difficulties we have had with radiators shipped from your plant, partly due to imperfect manufacture, and perhaps a portion due to rough handling while en route."

9. On October 30, 1918, the claimant wrote the Packard Motor Car Co. as follows:

"We have your letter of October 28th asking us to cancel the balance of the radiators due on your purchase order S-2409.

"Beg to advise that the writer had a distinct understanding with your Mr. Burns that we would hold up the manufacture of the balance of the radiators due on your order S-2409 until you had determined the type of radiators that you expected to use on your LaPere plane, and then would furnish the balance due on order S-2409 of this kind * * *. We hope you will let us complete the order as per our understanding with Mr. Burns and are looking forward to a receipt of blue prints * * *."

10. On November 9, 1918, the Packard Motor Car Co. wrote to the claimant:

"We have recently sent through a cancellation covering the balance of the radiators due on our order S-2409.

"Please be advised that at the time you were working on these radiators it was radically different than the one which has now been designed and approved by Captain LaPere.

"It would be impossible for you to build these radiators to the new design in time for us to use them, so we have taken it upon ourselves to make up radiators enough to complete the balance of our requirements."

11. On November 19, 1918, the claimant replied:

"We have your letter of November 9th asking us to cancel the balance of the radiators due on your order #2409.

"We will accept cancellation on this order with the understanding that the Packard Motor Car will pay us for all materials which we have on hand which were ordered to be used in making these radiators."

12. The claimant also submits with the proof of its claim a copy of a letter dated April 23, 1919, from the Packard Motor Car Co. to the claimant, as follows:

GENTLEMEN: We have received your claim and certificates in the amount of \$10,553.67, covering the direct loss which you incurred

on radiators which you sold us for LaPere planes for forwarding to the Bureau of Air Production.

When our order was placed with you, it was placed on the flat price of \$350 per radiator and we understand that it actually cost you nearly \$750 to produce these radiators.

It is distinctly understood that in accepting this claim we have agreed that there is no legal claim against us.

• Very truly, yours,

(Signed)

PACKARD MOTOR CAR CO.,
L. F. MCKENZIE,
Purchasing Dept.

13. The present claim is for losses suffered by the claimant in connection with its contract with the Packard Motor Car Co. It includes items for partly finished products left on its hands, labor, overhead, profit, and an item entitled "direct loss on radiators."

DECISION.

1. Claimant had a contract with the Packard Motor Car Co., which was a Government contractor. The prime contract with the latter company was completely performed and the prime contractor paid in full. There is therefore no contract, express or implied, with the Government over which this Board has jurisdiction.

It seems extremely doubtful whether any liability exists in favor of the claimant against the Packard Motor Car Co. The claimant has apparently released and canceled its claim against the prime contractor. This Board, however, does not undertake to decide upon that point. If a contract still exists between the claimant and the Packard Motor Car Co., the claimant may enforce its rights against the latter company by suit, or otherwise.

DISPOSITION.

Final order will issue denying relief to the claimant.

Col. Delafield, Mr. Montgomery, and Mr. Hunt concurring.

Case No. 1639.

In re **CLAIM OF SHOEDINGER-MARR CO.**

- 1. PURCHASE ORDER—NONCOMPLIANCE.**—Where claimant furnished the Government unwelded wire for the construction of a fence, and same was refused because the purchase order therefor specified welded wire, the Government is under no obligation, under the act of March 2, 1919, to reimburse the claimant its loss thereby sustained.
- 2. CLAIM AND DECISION.**—This claim for \$121 arises under the act of March 2, 1919, and is presented upon the theory that claimant was orally instructed to furnish a different wire for a fencing contract than that stipulated in the contract. Held, that there was nothing to show a mistake in the issuance of the purchase order or that there was any oral agreement to furnish fencing other than that stipulated in the order.

Lieut. Col. Junkin writing the opinion of the Board.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$121.00, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. A purchase order, No. 3220, was given claimants on June 28, 1918, calling for heavy galvanized welded fencing. On this order, after considerable delay, the claimant furnished the fencing which, not meeting the specifications, was refused acceptance by the Government, the order was canceled and fencing reordered elsewhere. The claimant now seeks reimbursement of the entire value of the fencing, although the claimant has retained the fencing.

DECISION.

There appears to be very little, if any, evidence to support this claim. The purchase order hereinbefore referred to specifically calls for a heavy welded fencing, while the claimant is seeking reimbursement for an unwelded fencing which it claims to have furnished. There is nothing in the evidence to show that there was a mistake in the issuance of the purchase order or that there was any verbal agreement for unwelded fencing such as the claimant alleges to have furnished. The claim must be denied.

DISPOSITION.

A final order of this Board denying relief will be entered accordingly.

Col. Delafield and Mr. Bryant concurring.

Case No. 1843.

In re CLAIM OF CONSOLIDATED MANUFACTURING CO.

1. **ANTICIPATED CONTRACT.**—Where claimant was advised that it had been recommended for an award of a contract to manufacture 20,000 woolen coats at \$1.49 each, and where no such award was ever made, the United States Government is under no obligation to reimburse claimant, under the act of March 2, 1919, the expenses incurred preparatory to performing the anticipated contract.
2. **CLAIM AND DECISION.**—This is an appeal from the decision of the claims board and is presented under the act of March 2, 1919, upon the theory that the United States Government is obligated to reimburse claimant its expenditures made preparatory to the filling of an order to make 20,000 coats according to claimant's bid. Held, that there was no agreement with the claimant within the provisions of the act of March 2, 1919, and claimant is not entitled to the relief sought.

Mr. McCandless, writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board, Director of Purchase, on a claim, the amount of which is not stated, under an alleged agreement made on the 4th day of November, 1918, between the claimant and an officer or agent acting under the authority of the Secretary of War.

2. The case was set for hearing on the 26th day of January, 1918. The claimant was notified of the date of hearing and wrote this board January 23, 1920, that it would not be represented at the hearing.

3. The claimant states in its claim that "Relying on the verbal assurances and notice of award, we have kept our organization intact." The claimant has submitted no evidence of any verbal assurances except the two letters of November 6, 1918, and November 5, 1918, which read as follows:

NOVEMBER 6, 1918.

1. This depot has just received advice from the Office of the Quartermaster General that you are being considered for an award on woolen service coats and it is desired at this time to give you this information that you may anticipate and make all necessary preparations to manufacture and deliver on contract time.

2. Materials will be issued to you by December 1st at the latest and, if possible, by November 15th, and the first delivery is to commence

January 4th of 2,000 garments. This depot wishes to impress upon you the necessity of making deliveries by that date and, if possible, in December, as in the next issuance of awards consideration will be given only to those contractors who give a 100% production, or better, on their contract.

By authority of the depot quartermaster:

(Signed) LAWRENCE S. MANN,
1st Lieut. Quartermaster Corps,
Asst. to D. Q. M.

NOVEMBER 5, 1918.

1. We are in receipt of your letter of November 2nd, wherein you request information regarding contract on wool coats.

2. In reply to the same this branch wishes to say that your concern has been recommended for an award of 20,000 wool coats to extend over a period of 10 weeks, deliveries on which to commence week ending January 4th.

3. This recommendation has left this office and will possibly consume some time in getting to you, as it must go through the various branches in this section, and also before the Board of Review in Washington; however, we will expedite this matter.

By authority of the Acting Quartermaster General:

CLOTHING BRANCH, UNIFORM SECTION,
By (signed) G. A. TALBOT.

4. It appears in October, 1918, the claimant submitted a bid for 20,000 wool coats at \$1.49 each, and that H. L. Wells, acting chief of the uniform section of the clothing branch, on October 29, 1918, recommended to the Board of Awards that the claimant be given an order for 20,000 coats at \$1.49 each. It will be noted that the two letters to the claimant dated November 5, 1918, and November 6, 1918, notify the claimant that it is "being considered," and "has been recommended for an award of 20,000 coats."

DECISION.

1. It appears from the two letters sent the claimant that it had notice that on November 5, 1918, and November 6, 1918, an award had been recommended and that it was being considered. If the claimant upon receipt of such information made expenditures in anticipation of receiving a contract it did so at its own risk. It has failed to give evidence of any agreement made with the Government and has submitted no evidence of any losses sustained.

2. We find that no agreement was made with the claimant within the provisions of the act of March 2, 1919.

Col. Delafield and Mr. Harding concurring.

Case No. 577.

In re CLAIM OF HOLBROOK CO.

1 AMORTIZATION OF FACILITIES UNDER SUCCESSIVE CONTRACTS.—

Where an oral agreement for the manufacture of propellers at a price sufficient to amortize the required special facilities was merged into two successive formal contracts, if such facilities have not been fully amortized under the first formal contract, then under Supply Circular 111 claimant is entitled on settlement of its second contract to the unabsorbed amortization. Where this has been done in the present supplemental contract, it should be accomplished by means of a further supplemental contract.

2. RELEASE.—Where in a settlement contract a release reserved to the claimant the right to file its claim for special facilities under the act of March 2, 1919, such release is not a bar to the settlement of its claim in another form or by another method when it is found that that act does not apply.

3. RE-FORMATION—MISTAKE.—Since there was mutual mistake in not providing in the second formal contract for the amortization unabsorbed by the first, claimant would now be entitled to re-formation of its second contract. The same results, however, may be more easily obtained by means of a further supplemental settlement contract.

4. CLAIM AND DECISION.—Statement of claim filed under act of March 2, 1919, treated as a petition under General Order 103 for relief under formal contract for airplane propellers. Held, claimant is entitled to unabsorbed amortization of facilities.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$6,180.04, by reason of an agreement alleged to have been entered into between the claimant and Lieut. E. L. Ryerson, jr., representing the United States, on or about the 16th day of January, 1918.

2. In January, 1918, John Graham, president of the claimant company, called on Lieut. Edward L. Ryerson, a negotiating officer of the Bureau of Aircraft Production, and informed him that the claimant was the manufacturer of automobile bodies, and wished to manufacture propellers for airplanes, and was willing to equip itself with certain added facilities for said manufacture, if it could obtain orders. Lieut. Ryerson sent an officer to inspect the claimant's plant,

and met John Graham again later in January, 1918, and informed Mr. Graham (p. 46) that he would give the claimant an order for 1,000 propellers (p. 47) at the prevailing price.

3. Between the date of the conversation late in January and the 13th day of February, 1918, the claimant was informed that the Government could only give him an order at that time for a total of 500 airplane propellers. On February 13, 1918, an order was sent the claimant for 500 airplane propellers at \$84 each. Later the contract therefor, No. 2903, dated March 2, 1918, was sent to the claimant.

4. On February 13, 1918, the claimant purchased certain additional facilities necessary for the manufacture of propellers so that it would be able to manufacture 10 propellers per day in accordance with the terms of the said contract for 500 propellers and claims that it expended \$9,694.32 for said additional facilities, and claims that after allowing itself 12 per cent for administrative charges, or \$4,534.91 and \$11,536.55 for overhead, its loss on the said contract for 500 airplanes was \$325.80. It summarizes its claim as follows:

Expenditures for special facilities:

General equipment.....	\$1,757.17
Machinery	4,612.59
Kiln.....	1,068.61
Glue room	2,255.95
Total	9,694.32
Less depreciation allocated to formal orders.....	1,615.72
Balance	8,078.60
Less salvage, estimated appraisal.....	1,898.56
Balance due.....	6,180.04

5. Contract 2903 was completed and the claimant was paid the contract price therefor. Meantime, on or about April 29, 1918, John Graham called on Lieut. Ryerson and requested that the claimant be given an additional contract for 500 airplane propellers, so that the claimant might have an opportunity to amortize the cost of the said additional facilities, which Mr. Graham said had not been covered by contract No. 2903. Eugene A. Schmitt and Lieut. Sibley were present at the said conference. Mr. Schmitt testified that Lieut. Ryerson said (pp. 43-44):

"At that time Mr. Ryerson suggested that Mr. Graham stop manufacturing propellers, and asked him on what basis he could get out of his equipment charge, and if he felt that if he gave him an order for 500 propellers, if that would let him out of this very considerable charge for equipment that he had installed. Mr. Graham said it would. Mr. Ryerson told him at that time that he would give him an order for 500 propellers in order to let him out, and at the end of that time Mr. Graham agreed to discontinue bidding for pro-

pellers, so that a few companies could continue and have a little more intensive production, distributed among fewer companies, rather than have many companies of a small type."

Lieut. Ryerson testified (p. 58) that Mr. Schmitt's testimony was correct; that on April 29, 1918, Mr. Graham told him that the cost of claimant's facilities had not been absorbed under the first contract No. 2903, and that it was his (Lieut. Ryerson's) intention to give claimant the second contract, to absorb the remaining unabsorbed costs of said facilities (p. 56); that about the time the first contract was given claimant, the Government engineer had calculated that a contract for 500 propellers, at \$84 each, allowed sufficient margin, over and above reasonable profit, to absorb amortization for facilities of \$10 each, or \$5,000.

6. On October 25, 1918, the claimant was given an additional contract No. 5088 for 500 airplane propellers at \$78.50 each, for which claimant ordered certain materials. The claimant manufactured no propellers on the contract No. 5088 and later settled its claim under the said contract for materials purchased for the sum of \$2,196.23, and released its claim against the Government therefor with the following reservation:

"Provided, however, That nothing herein contained shall preclude the contractor from filing pursuant to the act of March 2, 1919, a certain claim in the amount of six thousand one hundred eighty dollars and four cents (\$6,180.04) for certain increased facilities."

DECISION.

1. This case is not one properly coming within the act of March 2, 1919, and therefore claimant's statement of claim under that act should be treated by us as a petition under General Order 103, War Department, 1918.

2. We find that in January, 1918, Lieut. Ryerson agreed to give the claimant an order for 1,000 propellers at a price sufficient to amortize the special facilities necessary to be procured for the performance thereof; that subsequently and pursuant thereto the claimant was given a formal contract No. 2903 for 500 propellers and still later another formal contract No. 5088 for an additional 500 propellers, making the total of 1,000 originally agreed to. We find that the special facilities procured for the performance of the first contract No. 2903 were "specially provided and paid for by the contractor for the performance of the contract" namely, contract No. 5088 as well as for the performance of the first contract No. 2903 and "the necessity of which was contemplated at the time the bargain was made and the cost of which was included in the contractor's original estimate." Accordingly, under Supply Circular 111, 1918,

the claimant is entitled to a settlement under its contract No. 5088 for any amortization of such facilities necessarily procured, in the event that such amortization has not been completely absorbed under the first contract No. 2903. Upon the request of the claimant the Air Service Claims Board is directed to reopen the settlement of contract No. 5088 for the purpose of entering into a further supplementary contract in settlement of said amortization claimed, or so much thereof, if any, as may appear to be proper under this decision.

3. We do not think that the release contained in the settlement contract of June 23, 1919, which contains the reservation above quoted, will prevent this. In that release it was clearly the intention of the parties to reserve to the claimant its right to assert its claim against the Government for \$6,180.04 for increased facilities, and the form or method of presenting that claim appears to us to be immaterial.

4. We think that the foregoing is the proper disposition of this case. However, there is another theory upon which we arrive at the same ultimate result. It was undoubtedly the intention and agreement of the parties in making contract No. 5088 to reimburse claimant for all amortization not amortized by contract 2903. That intent is not expressed in the instrument, and clearly, in that respect, amounts to a mutual mistake in not including that provision. The Secretary of War may re-form contract No. 5088 by a supplemental agreement incorporating that provision which, through a mutual mistake, was omitted from the contract. This second theory would require the preparation and execution of a re-formed contract, No. 5088. However, since the same ultimate result is reached by the first theory above stated, without a re-formation of contract No. 5088, the Air Service Claims Board is advised to adopt the former method.

DISPOSITION.

The matter is hereby remanded to the Air Service Claims Board for compliance herewith upon the request of the claimant.

Col. Delafield and Mr. Shirk concurring.

Case No. 1221.

In re **CLAIM OF DEWEY BROS. CO.**

- 1. PERFORMANCE OF CONTRACT—DELAY.**—Where claimant had a formal contract for the delivery of hay in such quantities and at such times prior to November 16, 1917, as might be required, and the Government called for a large quantity on November 10, 1917, only part of which claimant delivered, such delivery, though made in December, must be construed as made under the contract and at the contract price. Claimant, therefore, is not entitled to be paid the difference between the market price and the contract price, on the theory that the Government in accepting the hay after the expiration of the time limit took it on an implied promise to pay the market value thereof.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied contract for hay. Held, claimant is not entitled to relief.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 by Dewey Bros. Co., Blanchester, Ohio, for \$612.21 upon an implied promise by the Government to pay for 89,477 pounds of hay delivered by the claimant to the Government on or about December 8, 1917.
2. Under date of August 25, 1917, the Government entered into a formal contract with the claimant providing for the delivery of between 700,000 and 4,200,000 pounds of hay prior to November 16, 1917, "in such quantities and at such times as may be required by the camp quartermaster, Camp Wadsworth." The Government agreed to pay for the hay at \$1.26 per hundredweight.
3. The hay upon which the present claim is based has been paid for at the price fixed in the contract and the amount now claimed is the difference between the contract price and the market price, \$1.90 per hundredweight, at the time of delivery.
4. Calls issued to and including October 2, 1917, required the delivery of 2,417,000 pounds of hay. On November 10, 1917, the Government called for the delivery of the remaining 1,783,000 pounds of hay. Between September 12 and December 8, 1917, the claimant delivered 2,506,477 pounds of hay, which included 89,477 pounds in

excess of the amount called for prior to the last call issued on November 10, 1917.

5. The claimant asserts that the call issued on November 10, 1917, did not give it sufficient notice of the Government's requirements to enable it to make a delivery before the expiration of the contract on November 16, and, therefore, this call having been improperly made, it is relieved of any obligation to make a delivery thereunder. With respect to the hay delivered in excess of the requirements announced prior to the last call, it is contended that the Government took the hay, not under the terms of the contract, but upon an implied promise to pay the reasonable value thereof.

6. The final delivery of 224,215 pounds of hay was made on December 8, 1917. As the last call prior to the one of November 10, 1917, was issued on October 2, 1917, and as the contract was to expire on November 16, 1917, it is clear that the claimant was delinquent to a considerable extent in its performance of this contract. There is nothing to indicate that any deduction has been made on account of damages, liquidated or otherwise, sustained by the Government because of the delayed delivery.

DECISION.

1. This claim depends upon whether the hay was a delivery under the contract or was hay which, having been appropriated and used by the Government, must be paid for on the basis of its market value at the time of appropriation.

2. The theory upon which the claimant relies, that it was entitled to notice of the amount of hay required reasonably in advance of the delivery date, and that, therefore, the call on November 10 for the delivery of hay on or before November 16 was not sufficiently in advance to enable the claimant to deliver hay under this call, is entirely dependent upon whether or not such a call did, in fact, give the claimant a reasonable time within which to make delivery.

3. If, as a matter of fact, it would have been physically possible for the claimant to have delivered the hay called for on November 10, 1917, within the unexpired term of the contract, it is clear that it was obligated so to do. What would be a reasonable notice to one claimant whose source of supply was in the immediate vicinity of the camp would not necessarily be a reasonable notice to another whose source of supply was at some distance from the point of delivery. It is impossible to fix arbitrarily the length of the notice to which the claimant was entitled.

4. In the present case the claimant experienced no difficulty in making delivery of 89,477 pounds upon which this claim is now based. It delivered this hay as a partial compliance with a call issued under

the terms of the contract on November 10, 1917, together with the undelivered balance of hay called for on October 2, 1917, and with no notice to the Government that it was being delivered other than in accordance with calls properly issued. The claimant was under a contractual obligation to deliver so much of the hay, whenever called for during the life of the contract, as it was physically possible to deliver. That the Government accepted deliveries after the contract had expired, or that it prosecuted no claim for damages or that it waived further performance of the contract has no bearing on this case.

5. It is the opinion of this Board that the claimant has failed to show cause justifying an award in any amount.

Col. Delafield and Mr. Montgomery concurring.

Case No. 1223.

In re **CLAIM OF DEWEY BROS. CO.**

1. **PERFORMANCE OF CONTRACT—DELAY.**—Where claimant had a formal contract for the delivery of hay in such quantities and at such times prior to November 24, 1917, as might be required, and the Government called for a large quantity shortly prior to that date, only part of which claimant delivered, such delivery, though made in January, 1918, must be construed as made under the contract and at the contract price. Claimant, therefore, is not entitled to be paid the difference between the market price and the contract price, on the theory that the Government in accepting the hay after the expiration of the time limit made an implied promise to pay the market value thereof.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied contract for hay. Held, claimant is not entitled to relief.

Mr. Hamilton writing the opinion of the Board:

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 by Dewey Bros. Co., Blanchester, Ohio, for \$4,872.35 upon an implied promise by the Government to pay for 773,389 pounds of timothy hay delivered by the claimant to the Government.
2. Under date of August 25, 1917, the Government entered into a formal contract with the claimant providing for the delivery at Camp Sheridan, Montgomery, Ala., of 7,200,000 pounds of hay prior to November 24, 1917, "in such quantities, at such times * * * as may be required by receiving officer." The Government agreed to pay for the hay at \$1.22 per hundredweight.
3. The hay upon which the present claim is based has been paid for at the price fixed in the contract, and the amount now claimed is the difference between the contract price and the market price, \$1.85 per hundredweight, at the time of delivery.
4. Calls issued to and including October 15, 1917, required the delivery of 2,300,000 pounds of hay. On November 10 and 15, 1917, the Government called for the further delivery of 1,000,000 and 700,000 pounds of hay. Between September 8, 1917 and January 29, 1918, the claimant is alleged to have delivered 3,073,389 pounds

of hay, which included 773,389 pounds in excess of the amount called for prior to the call issued on November 15, 1917. The Government records show total deliveries under this contract to have been 3,025,824 pounds of hay, or 725,824 pounds in excess of the requirements under the calls issued prior to November 15, 1917.

5. The claimant asserts that the calls issued on November 10 and 15, 1917, did not give it sufficient notice of the Government's requirements to enable it to make delivery before the expiration of the contract on November 24, and therefore, these calls having been improperly made, it is relieved of any obligation to make a delivery thereunder. With respect to the hay delivered in excess of the requirements announced prior to the last call, it is contended that the Government took the hay, not under the terms of the contract, but upon an implied promise to pay the reasonable value thereof.

6. The delivery of hay continued until January 29, 1918. As the last call prior to the one of November 10, 1917, was issued on October 15, 1917, and as the contract was to expire on November 24, 1917, it is clear that the claimant was delinquent to a considerable extent in its performance of this contract. There is nothing to indicate that any deduction has been made on account of damages, liquidated or otherwise, sustained by the Government because of the delayed delivery.

DECISION.

1. This claim, as in Case No. 1221, *Dewey Bros. Co.* (1, these Decisions 38), depends upon whether the hay was a delivery under the contract or was hay which, having been appropriated and used by the Government, must be paid for on the basis of its market value at the time of appropriation.

2. In the present case the claimant experienced no difficulty in making delivery of hay upon which this claim is now based. It delivered this hay as a partial compliance with a call issued on November 10, 1917, together with the undelivered balance of hay called for on October 15, 1917. No notice was given to the Government that this hay was being delivered other than in accordance with calls properly issued. The claimant was under a contractual obligation to deliver so much of the hay, whenever called for during the life of the contract, as it was physically possible to deliver. That the Government accepted deliveries after the contract had expired, or that it prosecuted no claim for damages, or that it waived further performance of the contract has no bearing on this case.

3. It is the opinion of this Board that the claimant has failed to show cause justifying an award in any amount.

Col. Delafield and Mr. Montgomery concurring.

Case No. 1.

In re CONTRACT WITH THE NATIONAL LAUNDRY CO.

1. **WAR DEPARTMENT BOARD OF CONTRACT ADJUSTMENT—JURISDICTION OF—UNLIQUIDATED DAMAGES.**—The War Department Board of Contract Adjustment has no jurisdiction of claims for unliquidated damages growing out of an alleged breach of contract when such contract has been executed in the manner provided by law. If the agreement, however, upon which the claim is founded has not been executed in the manner provided by law, the Board has jurisdiction to exercise such judgment and discretion in the settlement of the claim as the merits of the same warrant. (Act of Mar. 2, 1919.)
2. **CONTRACTS—FORMALITIES OF—AFFIDAVITS—NECESSITY OF.**—The law (R. S., secs. 3744—3745) neither requires nor contemplates that an affidavit should be affixed to the original contract. If it is affixed to a copy thereof that is sufficient. Where a contract between the Government and a contractor has been duly signed by the contractor and the authorized officer the same is rendered binding on both parties, such signatures being in full compliance with the provisions of sections 3744 and 3745, Revised Statutes.

Lieut. Col. Malone writing the opinion of the Board May 21, 1919:

FINDINGS OF FACT.

1. On the 4th day of September, 1917, the National Laundry Co., a corporation of Louisville, Ky., the petitioner herein, entered into a duly executed contract with Lieut. Col. Hugh T. Gallagher, Quartermaster Corps, United States Army, under the terms of which it agreed to render services and furnish facilities for the proper handling of laundry work for the Government and the officers and soldiers at the national cantonment (Camp Gordon), Atlanta, Ga., between September 10, 1917, and June 30, 1918.

2. The petitioner was required (a) "to call for and deliver [laundry] within five (5) days after the receipt thereof"; (b) "to provide the necessary staff to receive, check, deliver, and collect payment for all laundry"; (c) "to furnish services at schedule rates"; and (d) "to arrange with company commanders for the periodical payment of laundry bills [due] * * * from such organizations."

3. The Government covenanted as follows:

(a) "The laundry of each company must be assembled at a designated point, and delivery will only be made to such point." (Par. 4, contract.)

(b) "The Government will provide a suitable building with a floor space of not less than seven thousand five hundred (7,500)

square feet for a central receiving and distributing station within the cantonment reservation which will be suitably lighted and heated by the Government." (Par. 3, contract.)

4. The penalty clauses of the contract provide:

(a) "The contractor shall give a bond to the United States in the penal sum of twenty-five thousand (\$25,000) dollars, conditioned upon its faithful performance of this contract."

(b) "In the event the contractor shall fail to furnish the proper facilities and to perform the laundry work for the Government and the officers and soldiers of said cantonment to the satisfaction of the commanding officer of said cantonment, the Government shall have the right to have said laundry work done at any place where the same can be satisfactorily done, and the said contractor shall be liable to the contracting officer for any additional cost of such work when done elsewhere above the cost of doing the same through the contractor under the terms of this contract."

5. Petitioner maintains that, prior to the execution of this contract, certain representations, not reduced to writing, were made to it by Government officers that if the contract mentioned was accepted petitioner would realize from it a business of from \$12,000 to \$15,000 weekly. The value of this work did not average more than \$1,200 per week, and as a result of this disparity great losses of prospective profits were sustained. Petitioner also specifically alleges breaches of the contract, in that the Government failed for several weeks to provide for its occupancy and use a suitable building for receiving and distributing the laundry in question; delivered Government work to other laundries at Atlanta, Ga., that could have been supplied to petitioner; omitted to provide supervision and control in the premises, whereby petitioner lost exclusive privileges for the conduct of its business; arbitrarily promulgated orders with reference to the payment of laundry bills by officers and soldiers, thus preventing collection thereof by petitioner; and refused to pay for all services rendered to the Government itself.

6. The items of the claim submitted are as follows:

(a) Expenditures made to furnish facilities for a minimum volume of \$12,000 weekly business.....	\$2, 620. 00
(b) Traveling expenses, telephone and telegraph charges relating to erection of building which the Government was required to provide under the contract, and for cost of operations during the period of time that said building was not available for use or occupation.....	1, 786. 40
(c) Premium rebate on bond filed, owing to the Government's failure to supply business in relation to indemnity exacted.....	1, 100. 00
(d) Loss of profits in being prevented from negotiating with Atlanta laundrymen who tendered a contract to petitioner for work that could have been supplied by it on a percentage basis, and which was canceled by mandatory orders received from Government offices.....	7, 376. 77
(e) Increase in overhead pay roll made necessary to handle minimum of \$12,000 weekly business over what this expense would have been if petitioner was not required to make such arrangements	5, 840. 00

(f) Cost of equipment and upkeep thereof which would not have been purchased except for the action of Government officers in forcing petitioner to keep itself in a position to handle a minimum of \$12,000 weekly business-----	\$1,086.40
(g) Extra printing, lists, paper, etc-----	325.00
(h) Amount of money due to petitioner from soldiers, units, officers, and the Government for base hospital work. (This item is made up as follows:)	
1. Services to officers and soldiers-----	\$4,702.37
2. Services to base hospital-----	1,204.53
	5,906.90
(i) Loss of profits-----	42,197.69
Total amount of claim-----	60,139.16

7. The petitioner further alleges:

"This whole matter has heretofore been submitted to the War Department, and upon its being referred to the Inspector General a full and comprehensive investigation has been made by the Inspector General, and his report is in the hands of this Board, and a copy of the evidence taken is attached to the report, and we shall not in this petition go into what appears to be needless detail for the reason that full information is contained in the record now before this honorable Board."

8. The answer to claimant's contentions is found in a report based upon the examination of petitioner's representatives; many military officers of the Government; enlisted men and civilians at Washington, Camp Gordon (Ga.), Atlanta (Ga.), and Louisville (Ky.), made by Lieut. Col. Paul Hurst, Inspector General's Department, to the Inspector General of the Army, signed as of August 3, 1918, and briefly shows:

(a) At the time petitioner made its contract with the Government, September 4, 1917, it was informed by officials of the Quartermaster Corps that it would be required to furnish facilities for a business amounting to from \$12,000 to \$15,000 a week, but it was aware that there was no provision in its contract guaranteeing this amount of business. Before signing the contract, petitioner knew that this was a business venture and accepted the proposition with its eyes wide open.

(b) The Government did not provide a building for a central receiving and distributing station within the cantonment reservation suitably lighted and heated until November, 1917.

(c) The camp authorities, Camp Gordon, Ga., under date of October 5, 1917, in accordance with Memorandum 36 issued there from headquarters, provided for the collection and delivery of laundry of organizations, by supply units. This was done as soon as the central receiving and distributing station was sufficiently completed for its use as such, which was about October 5, 1917.

(d) Outside persons entered the cantonment reservation and collected laundry, but when their activities were reported to the proper authorities at Camp Gordon means were at once adopted to prevent

the offenders from continuing to enter the reservation. No tacit permission was given these parties to carry on this business, nor does it appear that there was any indication of indifference on the part of the camp authorities as to whether outside parties entered the cantonment for laundry work or not.

(e) The base hospital laundry work at Camp Gordon was given to petitioner until February 2, 1918, when, through delay in the return of laundry and loss of articles, the commanding officer of the camp directed the base hospital authorities to discontinue having their laundry work done by petitioner and to make arrangements for having it done elsewhere, as provided for by clause 2, paragraph 5, of the contract.

(f) There is no evidence to show that the officers and enlisted men at Camp Gordon failed to pay their accounts to petitioner when these accounts were promptly and correctly rendered, except in a few instances. Delays and failures so to pay were the result of slow rendering of statements improperly made out on the part of petitioner, its failure in not insisting on prompt settlement or adjustment after pay day, and because petitioner did not strictly comply with the provisions of paragraph 4 of the contract.

(g) Paragraph 4 of the contract between the Government and petitioner provides the manner by which petitioner was to arrange for the periodical payment of laundry bills. No agreement was made sanctioning the collection of cash from enlisted men by petitioner nor is there evidence to show that petitioner was prevented from collecting money due it from officers.

(h) Petitioner should be reimbursed, as hereinafter indicated, upon the presentation of proper vouchers covering expenditures incurred due to the failure of the Government to provide a suitable building for a central receiving and distributing station within the cantonment reservation from September 15, 1917, when petitioner was directed to start business, until November 18, 1917, when the records at Camp Gordon show that heat was installed in the building.

Rental for one floor, Building 132 B4, South Forsythe Street, Atlanta, Ga., Sept. 15, 1917, to Nov. 18, 1917-----	\$100.00
Equipment, consisting of tables, cases, loading trucks, tools and other furniture not required for a central receiving and distributing station had one been provided at Camp Gordon, Ga-----	400.00
Extra labor-----	1,600.00
Truck expense, including truck hire, labor, gas, oil, tires, etc-----	520.00
Total-----	2,620.00

9. It was stipulated by petitioner's attorney on the hearing of this matter by the War Department Board of Contract Adjustment that the testimony offered by the Government's witnesses in the investigation of this claim conducted in behalf of the Inspector General of the

Army might be received and considered here. This, having been carefully examined, was found to amplify merely the contentions of petitioner's representatives and those of Government employees indicated in the report filed herein by the Inspector General of the Army. Mr. William E. Riley and Graddy Cary, Esq., the president and the secretary of petitioner, respectively, were heard at length by the Board, as was Col. Charles A. Thomas, jr., United States Army, camp quartermaster at Camp Gordon, between August 5, 1917, and May 1, 1918, who appeared as a witness for petitioner. Their testimony was, for the most part, reiterative of the averments alleged in the petition.

10. The gravamen of its complaint is not that the Government failed to supply to petitioner the business contemplated, but that, after it became evident to both contracting parties that the work would not run higher than it did, petitioner was required by the Government to continue to provide facilities for a weekly business of \$12,000, when work only to the extent of \$1,200 weekly was given to it. This is the ground on which it bases its claim for damages.

DECISION.

The petition herein was filed November 18, 1918, and was, by permission of the Board, amended under date of December 16, 1918. At the request of petitioner the hearing of evidence was postponed until February 21, 1919, and action thereon has been further delayed owing to petitioner's failure to file a brief which it desired to submit for the consideration of the Board.

2. In our disposition of this matter we are at the outset confronted by the question as to whether jurisdiction necessary for the determination of it resides in the War Department Board of Contract Adjustment. The facts on which the claim is based clearly indicate that it is one for unliquidated damages growing out of an alleged breach of contract. Such claims may not be entertained or settled by executive officers save in exceptional cases wherein jurisdiction has been expressly conferred upon them by special or private acts. (*William Cramp & Sons v. United States*, 216 U. S., 494.) The Secretary of War has been authorized

"to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November 12, 1918, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation * * * for services or for facilities * * * when such agreement has not been executed in a manner provided by law. (An act of Congress to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes, approved Mar. 2, 1919.)"

The agreement, however, upon which this claim is founded was reduced to writing and appears to have been duly executed. If such were not the fact petitioner might, in the relief sought, invoke the provisions of the statute mentioned and, under it, the War Department Board of Contract Adjustment would have authority to exercise such judgment and discretion in the settlement of this claim as the merits of the same warranted.

3. We have read with interest the brief submitted by petitioner which discusses at length the two following questions:

(a) Is the claim of a liquidated or an unliquidated nature?

(b) Was the agreement, from breach of which the claim arose, one duly executed under the law so as to constitute a contract binding on petitioner and the Government?

The decisions cited to support the contention that petitioner's claim is liquidated rather than unliquidated do not seem to be applicable thereto. Each turned upon the construction of statutes and reiterated the familiar principle that claims based upon the doctrine of quantum meruit were not of such unliquidated character as would necessarily preclude actions thereon by way of set-off and attachment, both of which actions were unknown to the common law and are of purely statutory origin. None of these decisions attempts to define the difference between claims of unliquidated as distinguished from those of liquidated nature. They merely hold in effect that the damages sought, whether for the value of services rendered or for property, could be recovered under procedure outlined by said statutes because, and solely because, there was in each case considered a definite standard by which such values could be measured; and in no case was it necessary in order to measure such values to resort to the exercise of discretion and judgment. Counsel for petitioner seems to be somewhat confused on the question as to what constitutes a fixed and definite standard for the measurement of damages, which, in its application, would remove a claim from the category of the unliquidated to that of the liquidated. His contention is that because the damages alleged in the petition are evidenced by book entries and vouchers in petitioner's possession they are not of unliquidated character. This is tantamount to maintaining that any claim based upon damages, even though the latter may be unqualifiedly unliquidated, would, if set out by claimant as entries in books of account, by checks and vouchers, be metamorphosed, by reason thereof, from an unliquidated to a liquidated claim. Such reasoning, it seems clear to us, is fallacious. It will be observed in the claim filed by petitioner that nearly every item thereof related to expenditures *necessarily* made and obligations *necessarily* incurred which arose because of certain alleged defaults on the part of the

Government. These items are composed of varied and diverse elements. In making proof of the same most minute inquiry would be required wherein the employment of many if not all the methods of proof ordinarily adopted in establishing damages of an uncertain nature would be necessitated. There is no rule or uniform standard recognized by law, or fixed by the contract itself, by which the measure of damage invoked in the claim before us might be determined. It could be ascertained only, it seems to us, by taking testimony on many phases of the transaction entirely extraneous to the provisions of the contract and the law and by applying to such evidence, when the same was adduced, discretion and judgment appropriately exercised.

4. As to the point made that the contract herein was not duly executed as required by law because there was not affixed to the original thereof the customary affidavit of the contracting officer, we are of opinion that this omission did not invalidate the contract. The fact is that an affidavit verified by the contracting officer appears on the copy of said contract filed in the Returns Office of the Department of the Interior October 5, 1917. The law neither required nor contemplated that said affidavit should be affixed to the original contract. If it is affixed to a copy thereof, that is sufficient. The Revised Statutes provide,

(a) "Sec. 3744. A copy shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior."

(b) "Sec. 3745. It shall be the further duty of the officer before making his return, according to the preceding section, to affix to the same his affidavit."

Notwithstanding the fact that the provisions of the statutes quoted above seem to be plain and unambiguous, reference is made to interpretation of them as follows:

"The clauses in section 3744 R. S., requiring the filing of copies in the Returns Office, are likewise mandatory, while the failure to comply with this mandate will not invalidate the contract because it passed beyond the control of the party entering into it, yet the officer can not be excused for the neglect of the duty imposed upon him to file the copy. (28 Op. Atty. Gen., 66.)"

"Casey, Ch. J.: Is the provision requiring it to be reduced to writing directory or mandatory—discretionary or imperative? I feel quite clear in saying that a contract reduced to writing and executed with all the formalities and solemnity the law requires, will not be invalidated by the failure of the officer to make his proper return of the same. (*Henderson's Case*, 4 Ct. Cl., 75.)"

It necessarily follows that since the contract under our consideration was duly signed by petitioner and the contracting officer, the same was thereby rendered binding on both parties; such signatures

being in full compliance with the provisions of section 3744 and 3745 of the Revised Statutes.

5. Our conclusion, therefore, is that unless petitioner accepts settlement of this claim in accordance with recommendations made by the report submitted herein to the Inspector General of the Army, indicated in our findings of fact, and executes proper releases in the premises, the entire controversy in this matter should be left for the determination of the courts.

Col. Garnett and Col. Lehman concurring.

Case No. 1.

[Decided originally May 21, 1919. Appeal taken to Secretary of War. Reconsideration directed by the Secretary of War. Reconsideration and rehearing afforded.]

In re CLAIM OF NATIONAL LAUNDRY CO.

1. **JURISDICTION OF BOARD ON CONTRACT ADJUSTMENT—UNLIQUIDATED DAMAGES.**—See former decision of the Board, Volume III, page —.
2. **CONTRACTS—FORMALITIES OF—AFFIDAVITS—NECESSITY OF.**—See former decision of the Board, Volume III, page —.
3. **NEGOTIATIONS MERGED IN WRITTEN CONTRACT.**—Where parties conduct negotiations, which are afterwards embodied in a written contract, the negotiations with reference to the subject matter and the agreements are merged in the contract; and where the claimant made a written contract with the Government which bound claimant to do a certain kind of work at certain prices, the volume or amount of which was not specified in the contract, the claimant will not be permitted to vary or alter the terms of the contract by showing that during the negotiations the officers representing the Government made certain statements or estimates as to amount of work the claimant would be given in performing the contract.
4. **RE-FORMATION OF CONTRACT.**—Where claimant seeks the re-formation of a written contract with the Government, upon the ground that during the negotiations the contracting officer made certain statements or representations as to the amount or volume of work which would be given to claimant under the contract, and the contract itself did not provide for any specific amount or volume of work and there was no mistake as to its provisions, claimant is not entitled to the relief of re-formation.
5. **LIABILITY OF GOVERNMENT FOR BILLS OF OFFICERS AND MEN.**—Where claimant was under obligations, by a formal contract, to do certain laundry work for the Government, and also to do similar work for officers and enlisted men, at prices specified in the contract, there was no obligation on the part of the Government to pay claimant for services rendered to said officers and enlisted men or to collect the bills for said services, in the absence of a provision to that effect in the contract.
3. **TERMINATION OF FORMAL CONTRACT—POWER OF SECRETARY OF WAR TO AWARD DAMAGES FOR BREACH.**—Where, after the termination of a formal contract, a claim is made for unliquidated damages arising from the failure of the Government to provide certain facilities which the contract obligated the Government to supply, the Secretary of War has no power to adjust the same.
7. **CLAIM AND DECISION.**—Claim is made under General Order No. 103 under formal written contract and is for the sum of \$69,139.16 for laundry work and facilities at Camp Gordon. The claim is based upon several

alleged breaches of contract on the part of the Government and also as to some items for work done in performance of the contract. Held, that claimant is entitled to be paid for that item of its claim for laundry work for the base hospital at Camp Gordon, at the rates mentioned in the contract, subject to proper correction, and that all other items be disallowed.

Mr. Hunt writing the opinion of the Board.

OPINION ON REHEARING.

NATURE AND ORIGIN OF CLAIM.

This is a claim filed under General Order 103. On the 4th day of September, 1917, the National Laundry Co., a corporation at Louisville, Ky., the claimant herein, entered into a duly executed contract with the United States, which contract was executed by Lieut. Col. Hugh T. Gallagher, Quartermaster Corps, United States Army, contracting officer, under the terms of which the claimant agreed to render services and furnish facilities for the proper handling of laundry work at the national cantonment, Camp Gordon, Atlanta, Ga., between September 10, 1917, and June 30, 1918.

Controversies arose between the parties during the performance of the contract. The claimant, after endeavoring without success to secure satisfaction from the Camp Gordon authorities, set out its claim in a letter to Senator Ollie James, who transmitted it to the Secretary of War June 18, 1918, who referred the matter to the commanding general Camp Gordon for investigation and report. Brig. Gen. W. H. Sage, commanding, reported on June 27, 1918, admitting certain allegations of the claimant and denying others, but asserting in general that the claimant had not performed its obligations under the contract. The matter was then referred to the Inspector General of the Army for further investigation, report, and recommendation. Lieut. Col. Paul Hurst, Inspector General's Department, reported August 3, 1918, and recommended the payment of an item of \$2,620, representing the cost to claimant of certain facilities substituted for those which the Government was obligated to furnish and did not, and recommended the reference to the Judge Advocate General of the question whether the "spirit of the contract had been broken through the officers of the Cantonment Division, Office of the Quartermaster General, requiring the claimant to provide facilities for handling an amount of business never realized, and whether the claimant is entitled to reimbursement of financial loss occasioned thereby."

Accordingly the matter was referred to the Judge Advocate General, which officer reported thereon to The Adjutant General on September 12, 1918, as follows:

"In the opinion of this office this is a claim by the National Laundry Co. for unliquidated damages growing out of an alleged breach of contract. That it is not a matter that can be settled by this department, since executive officers are not authorized to entertain and settle claims for unliquidated damages. (*Cramp & Sons v. U. S.*, 216 U. S., 494.)

"Further, the Comptroller of the Treasury has held that such claims, because of lack of any proper liquidation, the accounting officers may not be able to properly liquidate and allow. (XXI Comp. Dec., 139.) This is a matter which should be settled by a judicial determination by the courts.

"(Signed) S. T. ANSELL,
"Acting Judge Advocate General."

On September 18, 1918, The Adjutant General informed the claimant of the Judge Advocate General's decision. The claimant then filed its claim with the Board of Contract Adjustment under General Order 103.

The petition of the National Laundry Co. was verified November 18, 1918, and filed with the Board of Contract Adjustment soon thereafter. Subsequently, an amended petition was filed, which was verified December 16, 1918. At the request of the petitioner the hearing of evidence was postponed until February 21, 1919. The determination of this claim was further delayed by the claimant's failure to file a brief, for which it requested the Board to wait.

DECISION OF MAY 21, 1919.

The Board rendered its decision on May 21, 1919, finding the claimant entitled to reimbursement in the sum of \$2,620 for its expenditures incurred by reason of the failure of the Government from September 15 to November 18, 1917, to fulfill its obligation under the contract to provide a suitable building for a central receiving and distributing station, denied the other items of the claimant's claim, and apparently required it to surrender its right to resort to the courts if it accepted payment of this said item. The claimant was dissatisfied with the decision of the Board, and accordingly took an appeal to the Secretary of War, who referred the matter to Lieut. Col. Arthur O'Brien. Lieut. Col. O'Brien recommended in a memorandum dated August 21, 1919, that inasmuch as an item of the claimant's claim entitled "Services to base hospital," was a claim growing out of the contract and was liquidated, it should be allowed. This item amounted to \$1,204.50. He also recommended the payment of an item amounting to \$1,080.40 for traveling expenses, telephone and telegraph charges identified with the efforts of the claimant to procure the performance by the Government of its agreement to furnish a central distributing building for claimant's purposes. He recommended further that this Board reconsider the claimant's claim for

reimbursement of expenditures to put itself in readiness to take care of laundry aggregating \$12,000 per week, and finally that "these proceedings be referred back to the Board for reconsideration of the items indicated." The Secretary of War indorsed Lieut. Col. O'Brien's memorandum, as follows:

"The action above suggested is taken without prejudice to the consideration the Board of Contract Adjustment is requested to give the items indicated."

RECONSIDERATION OF THE CASE.

Consideration of the items indicated has necessitated reexamination of the Board's decision and the record.

CLAIMANT'S PETITION AND AMENDED PETITION.

The claimant's petition and amended petition set out its claim with particularity. A summary thereof follows:

It is averred that the National Laundry Co. was and is a Kentucky corporation; that prior to the execution of the contract of September 4, 1917, it was represented to the claimant by officers representing the Government, that the volume of laundry which the contractor would receive and which it would be expected to furnish the facilities to handle, would be at least \$15,000 a week; that the claimant was directed by the Government to furnish facilities for a minimum of \$12,000 of work a week and was notified that it would be held liable under its bond if it failed to provide facilities for doing whatever laundry work was offered to it at Camp Gordon, even if the volume ran in excess of \$15,000 a week; that the claimant company was given by the contract the exclusive laundry at this cantonment; that the contract provides that the National Laundry would be given all the Government laundry at Camp Gordon; that the Government obligated itself to provide a suitable building of certain specifications and dimensions for a central receiving and distributing station within the cantonment reservation, which building was to be heated and lighted by and at the expense of the Government; that the Government further obligated itself to deliver and call for such laundry as the National Laundry Co. should be called upon to handle at this neutral receiving and distributing station; that immediately after the execution of this contract the contractor proceeded to Atlanta, and for the first time ascertained that the Government had provided no facilities and that the building provided for had not been erected; even its site had not been selected; that the contractor protested that he should not be required to begin doing work until the Government had carried out its part of its contract and supplied the necessary facilities; that thereupon the contractor was notified that if it did not accept laundry immediately the contract would be forfeited,

and it would be proceeded against on its bond. The petition further sets out that over its protest the contractor accepted laundry at Camp Gordon and made arrangements to acquire one of the largest laundries in Atlanta; that the Government on hearing that the contractor contemplated handling the laundry at one large laundry, notified the contractor that no one laundry could possibly handle the volume of business which would be offered, and that it notified the contractor that if the contractor did not immediately arrange to handle the volume of not less than \$12,000 a week the contract would be canceled and the bond forfeited. It is then alleged that this demand entailed upon the contractor the necessity of changing its entire plan for handling the laundry at Camp Gordon, and that by reason of the insistence of the Government that it immediately made arrangements for handling a volume of \$12,000 per week, the contractor was forced to make arrangements which completely eliminated any profit to it under the contract, unless the volume represented by the Government as the amount which the contractor would receive each week was forthcoming; that in order to do the work without the facilities guaranteed by the Government it was necessary for the contractor to purchase a number of trucks, to rent buildings at Atlanta, and to spend large sums which it would not have been compelled to spend but for the failure of the Government to provide the facilities contracted for. It is further stated that after the claimant entered upon the work the Government posted an order prohibiting the contractor from collecting cash from the soldiers for laundry and required the contractor to extend credit to the military companies in training at Camp Gordon, and that it also required the contractor to cancel the arrangements the contractor had made with the said companies for the payment of bills for laundry upon its delivery, and that the Government, in violation of the contract and in violation of its own formal order, made no effort to enforce the payment of the contractor's bill, but required the contractor to continue to do this laundry work without securing compensation for laundry work already done. It is also set out that many weeks elapsed after the contract was entered into and after the contractor was required to handle laundry work under the contract before the building provided for in the contract was erected, and that the contractor was forced to make more than a dozen trips to Washington before the building was erected, and that the building never was at any time adequately heated or lighted, notwithstanding the provisions of the contract which required the Government to provide this building and heat and light the same at its own expense. The petition also avers that the Government failed to safeguard the contractor in its exclusive privileges under its contract, and that much of the hospital work of the Government was handled

by laundrymen other than the contractor, and that this was done repeatedly over the protest of the contractor.

It is stated that the Government did not carry out its part of the contract either by furnishing the building provided for in the contract, or by the delivery of the volume of laundry which should have been delivered; that the Government did not pay under the contract the amounts due to the contractor, and arbitrarily posted orders which precluded the contractor from receiving compensation from any source for services rendered.

It is further stated that if the Government had carried out its contract it would not have been necessary for the contractor to have rented or equipped buildings in Atlanta, which he did actually rent and equip, and that it would not have been necessary for the contractor to have purchased the trucks or incurred the expense of sending them through the camp to collect and deliver laundry; that no road was built by the Government to the central receiving and distributing station, and that throughout the bitter winter months the contractor's employees were forced to work in a building, the floor of which was during much of the time covered with ice; that by reason of this situation it was difficult for the claimant to secure employees and it was necessary for it to carry on its pay rolls a large additional force. It is further stated that after the contractor had been forced, as set out above, to furnish facilities for handling at least \$12,000 worth of laundry work a week it was never given more than a small percentage of that amount, and that this situation resulted in the contractor being forced to carry overhead charges out of all proportion to the volume of business done. It is stated also that the claimant furnished the companies at the camp many statements of account, but that it was unable to collect for services rendered from soldiers and officers and that soldiers and officers were permitted to leave Camp Gordon without payment of the claimant's charges. Petition then sets out seven particulars in which it alleges that the Government did not perform its contract, and that the contractor's actual loss occasioned by these breaches of contract by the Government amounted to \$24,744.78, exclusive of all claims for profits. The petition also avers that, although an effort has been made to dispose of this claim by mutual agreement, the said effort has not succeeded. It then avers that contracts for laundry at camps other than Camp Gordon were exhibited to this contractor; that in these contracts the contractor was guaranteed a gross volume of \$60,000 per week, and that because of these representations the contractor entered into said contract. The amended petition also avers that subsequent to the execution of this contract, it estimated the volume of business which it might expect at Camp Gordon and concluded that the Government's representations were in excess of what the actual business would be, and

that the contractor then made arrangements which would have enabled it to handle a volume of \$5,000 worth of work per week, and that when this state of facts was reported to the contracting officers of the Government, the contractor was notified that if it failed to provide facilities for handling a business of \$12,000 per week its contract would be canceled and its bond forfeited, and that thereupon over its protest the contractor, relying upon the assurance of the Government that the volume of business would amount to not less than \$12,000 per week, did make the necessary arrangements to handle that volume of business. It is also set out that the contractor's bond was in the sum of \$25,000; that the premium on said bond amounted to \$1,250; that the contractor was damaged in the sum of the difference between \$1,250 and \$150 which would have been the premium had the contract been based upon the volume of work estimated by the claimant. The amended petition then sets out items aggregating \$16,629.17, which represents expenditures made necessary by the action of the Government in requiring facilities in excess of the contractor's estimates. It further sets out a loss of profits based on an opportunity to handle work to the extent of \$12,000 per week. This item is in the sum of \$40,000. It also sets out an item representing the amount of money due it by soldiers, military units, officers and the Government itself for work done for the base hospital, in the sum of \$5,906.90.

THE PRIOR HEARING AND DECISION OF MAY 21, 1919.

At the hearing afforded the claimant oral and documentary evidence was submitted in support of its allegations. By consent the testimony taken by the Inspector General was made a part of the record. In its decision the Board held that the claimant should be reimbursed for expenditures made by it by reason of the failure of the Government to provide a suitable building for a central receiving and distributing station from September 15, 1917, until November 18, 1917. The aggregate of these expenditures was found to be \$2,620. The decision accorded with the report submitted to the Inspector General by Lieut. Col. Hurst. The concluding paragraph of the decision is in the following terms:

"Unless the petitioner accepts settlement of this claim in accordance with recommendations made by the report submitted herein to the Inspector General of the Army and executes proper releases in the premises the entire controversy in this matter should be left to the determination of the courts."

As the Inspector General's report had recommended payment of this item of \$2,620 only, the effect of this judgment would seem to be to deny the claimant recourse to the courts if he accepted payment of this item.

The decision holds that the contract of September 4 was executed in the manner prescribed by law and that therefore the subject matter of the claim was not within the provisions of section 1 of the act of March 2, 1919. The opinion states (p. 6)—

“The facts on which this claim is based clearly indicate that it is one for unliquidated damages growing out of an alleged breach of contract. Such claims may not be entertained or settled by executive officers save in exceptional cases wherein jurisdiction has been expressly conferred upon them by special or private acts.”

There is no finding of an agreement, written or oral, subsequent to the contract of September 4, 1917, whereby that contract was amended or supplemented and no finding of any agreement implied in fact or in law.

On what ground this Board supported the approval of the Inspector General's recommendation for the payment of the item of \$2,620 does not appear. The item is the expense of substituting other facilities for the distributing building the Government was obligated to provide but did not provide until some six or seven weeks after the contractor was directed to begin performance. No provision to compensate the claimant for such expense is alleged or provided, nor does it seem it can arise by implication of law or otherwise. It can not be brought within any provision of the contract. The omission to supply the building constituted a breach of contract by the Government, upon which the contractor might have refused further performance and brought an action for damages. The contractor might also have proceeded to perform and then brought suit for such damage as it suffered by reason of this breach. The power of the Board to award compensation for such breach is discussed below.

The decision may have been formulated upon the theory that it constituted a direction to the appropriate contracting officer to enter into a supplemental contract with the claimant terminating the contract of September 4, 1917, on the terms outlined in the decision. This possibility and the jurisdiction of the Board to make such direction is further discussed below. The contract out of which this controversy arose was as follows:

“This agreement made and entered into this 4th day of September, in the year nineteen seventeen, between Lt. Col. Hugh J. Gallagher, for and in behalf of the United States of America (hereinafter called the contracting officer), party of the first part, and the National Laundry Company, a corporation existing under the laws of the State of Kentucky, of Louisville, Kentucky (hereinafter designated as contractor), party of the second part,

“Witnesseth: That the said parties do hereby mutually covenant and agree to and with each other as follows:

“1. That the contractor shall furnish the services specified below in the manner, at the rates, at the place or places, and at the time or

times during the period commencing with the 10th day of September, 1917, and ending with the 30th day of June, 1918.

"The contractor shall furnish the laundry facilities to properly handle all of the laundry work for the United States Government and the officers and soldiers at the National Army Cantonment at Atlanta, Georgia, and do said laundry work to the satisfaction of the commanding officer of said cantonment at the rates specified upon the annexed schedule.

"2. The contractor agrees to call for and deliver within five (5) days after the receipt thereof the laundry of the Government and of the officers and soldiers of the cantonment at the points which will be designated by the cantonment quartermaster. There will be delivered for each soldier the same uniform, shirts, underwear, socks, and other personal wearing apparel received from him. The same sheets, pillow cases, mattress covers, towels, and blankets will not be returned, but there will be delivered for each soldier the same quantity of these articles as was received from him.

"3. The Government will provide a suitable building, with a floor space of not less than seven thousand five hundred (7,500) square feet, for a central receiving and distributing station within the cantonment reservation, which will be suitably lighted and heated by the Government.

"4. The contractor will provide the necessary staff to receive, check, deliver, and collect payment for all laundry work. The contractor will arrange with the company commanders for the periodical payment of laundry bills from such organizations. The laundry of each company must be assembled at a designated point, and delivery will only be made to such point.

"Each bundle of laundry handled by the contractor shall bear a slip on which will be printed the schedule of rates for each piece. This slip will carry the name of the sender, together with his company, regiment, and division. Claim against the contractor must be accompanied by the original laundry list in each case and must be made within twenty-four (24) hours of the receipt from the contractor. All claims for lost laundry shall be settled by replacement in kind.

"5. The contractor shall have the exclusive privilege of entering upon the cantonment grounds for the purpose of collecting and delivering laundry.

"In the event the contractor shall fail to furnish the proper facilities and to perform the laundry work for the Government and the officers and soldiers of said cantonment to the satisfaction of the commanding officer of said cantonment, the Government shall have the right to have said laundry work done at any place where the same can be satisfactorily done, and the said contractor shall be liable to the contracting officer for any additional cost of such work when done elsewhere above the cost of doing the same through the contractor under the terms of this contract.

"The contractor shall give a bond to the United States in the penal sum of twenty-five thousand (\$25,000.00) dollars, conditioned upon its faithful performance of this contract.

"6. In the event that the laundry work for the cantonment is withdrawn from the contractor through no fault of its own, prior to the 30th day of June, 1918, the Government agrees to take over the

motor trucks provided by the contractor for the handling of said laundry work at their original cost less twenty-five (25%) per cent depreciation; provided, however, that the entire original cost shall not exceed the sum of twenty-five thousand (\$25,000.00) dollars.

"7. That there shall be no transfer of this contract or of any interest therein by the contractor to any other party, and in case of the violation of this provision the United States, reserving all rights of action for any breach of this contract by the contractor, may refuse to carry out this contract with either the transferer or the transferee.

"8. That no Member of or Delegate to Congress, or resident commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be, admitted to any share or part of this contract, or to any benefit which may arise therefrom, but, under the provisions of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109), this stipulation, so far as it relates to Members of or Delegates to Congress, or resident commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

"9. That, at the option of the United States, this contract, with all its covenants and agreements, may be renewed annually as often as the needs of the public service may require, so as to give to the United States continuous service, not extending, however, beyond the thirtieth day of June, 1927; provided, that in the event there shall be an increase in the operating cost of the contractor, due to an increase in the cost of supplies and labor for conducting laundries, in any such annual renewal the schedule of rates shall be adjusted so as to include a proportionate increase.

"In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

"Witness:

"(Sgd.) A. BINGER, as to
(Sgd.) "HUGH J. GALLAGHER, J. H. B.

"(Sgd.) E. T. DEGG, Jr., as to
(Sgd.) "NATIONAL LAUNDRY COMPANY,
(Sgd.) WM. E. RILEY, Pres.
(Sgd.) GRADY GARY, Secretary."

Then follows a schedule showing the contractor's rates by the piece.

It will be observed that this contract does not obligate the United States to provide the contractor with any particular volume of laundry work, nor does it obligate the contractor to furnish any particular facilities. The contractor binds himself to "furnish the laundry facilities to properly handle all of the laundry work for the United States Government, and the officers and soldiers at the cantonment * * * and do said laundry work to the satisfaction of the commanding officer of said cantonment."

REPRESENTATIONS PRIOR TO CONTRACT.

The claimant's petition avers and the evidence tends to show that prior to the execution of this contract representations were made

to it that the volume of laundry work at Camp Gordon would be not less than \$12,000 work per week; that the proposal, in reliance upon which the said contract was submitted, recited that 36,000 men would be mobilized and trained at Camp Gordon, and that it contained an estimate that these men would originate laundry each week to the extent of 95 cents (at the claimant's prices) per man; that it was instructed that it might furnish facilities to handle at least \$12,000 worth of business per week; that its bond was fixed at \$25,000 because that amount would cover two weeks' laundry, estimated at \$12,000 per week, which the claimant might be expected to have had at one time. According to the claimant's attorney, Mr. Gary, Maj. Shelby, who had charge of the making of these laundry contracts for the Government, said to Gary on or about September 2, 1917 (Rec., p. 19), "the Government's experts expect a volume of business in accordance with the proposals, which at your prices amounts to 97 cents a man per week for 36,000 men." Mr. Gary then states (Rec., p. 19): "The result of these several interviews with Maj. Shelby was that we finally signed the contract which is in evidence."

The above statement is believed to sum up fairly the claimant's allegations and proof on the subject.

EFFECT OF SAID REPRESENTATIONS.

The rule of law is that when any contract has been reduced to writing such writing can not be contradicted, altered, added to, or varied by parol or extrinsic evidence. Written instruments would come to be of little value if their explicit provisions could be varied, controlled, or superseded by such evidence.

See *Pitcairn v. Hiss* (125 Fed., 110, 113, C. C. A. 1903)—Archbald, J.:

"According to the modern and better view the rule which prohibits the modification of a written contract by parol is a rule not of evidence but of substantive law. (21 C. & E. Enc. Law (2nd ed.) 1070; Thayer Evidence, p. 390 et seq.; 1 Greenleaf Ev. (16 ed.), par. 350.) Parol proof is excluded not because it is lacking in evidentiary value but because the law declares for some substantive reasons that what is sought to be proved by it (being outside the writing by which the parties have undertaken to be bound) shall not be shown. The writing is a contractual act of which that which is extrinsic forms no part. If through fraud, accident, or mistake it fails to express the contract as it was intended to be made, equity will reform it upon proper proof."

See also *Culver v. Wilkinson* (145 S., 205):

"Where there is no uncertainty in the written instrument as to the object or extent of the engagements of the parties all previous negotiations with reference to the subject matter and agreements are

presumed to have been merged in the written contract and the whole engagement of the parties and the extent of their undertaking is presumed to have been reduced to writing."

See 17 Cyc. 598 and cases cited.

Moore v. Prather (23 Wallace, 492; 17 Cyc., 598).

The application of the rule to the present case with reference to such items of the claim as are based upon the nonhappening of the events prophesied in representations not embodied in the contract must result in their denial. The contract itself will be examined in vain for an engagement by the Government that it would furnish the contractor business to any particular quantity. The engagement on the Government's part was in substance that the contractor should have the exclusive privilege of entering upon the cantonment grounds for the purpose of collecting laundry, that the Government would pay the agreed price for such laundry work of its own as it might permit the contractor to do if performed to the reasonable satisfaction of the commanding officer and would provide the distributing station. The United States was free under the terms of this contract to erect its own laundry and do its own laundry work and indeed to agree with anyone to do all of it or any part of it provided it delivered and received said laundry without violating its engagement that the National Laundry Co. should have the exclusive privilege of entering upon the cantonment grounds for those purposes. Paragraph 5 of the contract clearly reserves to the United States the right to proceed in the manner stated. This is a hard contract, but the claimant entered into it voluntarily.

But was there mistake with reference to the contract?

Assuming that the Board has jurisdiction to reform contracts in a manner as to make them express the intention of the parties, it is clear that the case is not one for the exercise of such jurisdiction.

The record shows that there was no mistake for which a court of equity would reform the contract and that the contract does express the intention of the parties.

Mr. William Riley, the president of the claimant company, testified (Rec., p. 95):

"I have been operating laundries for fifteen years; I have consolidated several and owned several. I went with Mr. Cary to Maj. Shelby's office [on the occasion referred to above]. I was very familiar with the subject. I had discussed laundry prices for soldiers with the laundrymen of Louisville, and we had fixed a list of prices to be used in connection with the laundry at Camp Taylor (national cantonment near Louisville). I was familiar with the proposals and had gone over them, advising the association concerning the same. I had been doing soldiers' work for some length of time at Louisville before then and since. The most important element of the business was fixing the list of prices. The most important informa-

tion I could get before I fixed the prices was the probable quantity of the business, the volume of business * * * I asked the privilege of looking at the form of contract that was proposed, and I was shown the contract from Camp Ayer. I was thoroughly impressed with the fact that we were to have \$12,000 to \$15,000 worth of business a week, although I did not believe there would be that much work for quite a while. If I had known that there would not have been but a few thousand dollars' worth of work a week I would not have touched the proposition. It would have been folly to think about it. I then made up the list of prices submitted there * * * and the contract was entered into."

This testimony of the claimant's president seems sufficient to negative any idea of accident or mistake with reference to this contract. Mr. Riley was an experienced laundryman. He had been doing work for soldiers for some time at Louisville and knew the volume of business that might be expected from a cantonment of 36,000 men practically as well as the officers of the Government. He was familiar with the proposals. He had the contract of Camp Ayer before him. Mr. Cary, the claimant's attorney, testified furthermore (Rec., p. 16) that Maj. Shelby exhibited a Government laundry contract in which the Government guaranteed the contractor \$60,000 worth of business a month. Despite Mr. Riley's experience and knowledge of the circumstances and conditions surrounding the subject matter and in spite of the fact that in other contracts the Government guaranteed \$15,000 worth of work a week, the claimant's representatives, Mr. Cary and Mr. Riley, neglected to require the insertion in the contract of a clause guaranteeing any particular volume of work on the part of the Government. The very matter which they say they regarded as the essence of the subject matter they omitted to provide for, although their attention was upon it at the time. It is probable that the omission of any obligation on the part of the Government to furnish laundry to the extent of \$12,000 a week, or any other amount, was by reason of the omission of any obligation on the part of the contractor to provide any particular amount of facilities. (See Rec., p. 74.)

"Mr. CARY. * * * The contract provided—there was not anything said about any facilities we would have to have. They left the guaranty out of the contract, and we did not put in anything about the facilities we should have."

A party will not be given relief against a mistake induced by his own negligence, as, for example, where he has failed to avail himself of means of knowledge of the facts.

See 16 Cyc., p. 69. *United States v. Ames* (24 Fed. cases No. 14440, affd. 59 U. S., 35.)

But in the present case there is no evidence of mistake. The evidence is that the contract embodied what the parties intended it

should. The omission of any guaranty by the United States of the volume of work was not an inadvertence. The subject was discussed and carefully considered by the contractor. This Board is clearly without power either in law or equity to insert in the contract an obligation on the Government, which obligation the parties considered and deliberately omitted. There is not even a showing that the claimant requested the inclusion of such an obligation. The evidence tends to show that the omission of any guaranty on the part of the Government of a particular volume of work was traded for the omission of any obligation on the contractor to provide any particular facilities.

"Where the opportunities for information have been on both sides equal, where there has been no concealment by one of the facts which the other was entitled to know, and where both have acted in good faith, there can be no relief on the ground of mistake." (16 Cyc., 69.)

"A mistake, to be relievable, must relate an existing fact and not a probability of a future event." (*Parke v. Boston*, 175 Mass., 464.)

In the present case, if there was a mistake, it was a mistake in estimating the volume of work the men at Camp Gordon would produce. This production of work was clearly a future event at the time of the execution of this contract.

CLAIMANT'S EXPENSE DUE TO OMISSION OF THE GOVERNMENT TO PROVIDE
THE DISTRIBUTING BUILDING UNTIL NOVEMBER 18, 1917.

The petitioner avers and this evidence shows that the distributing building was not completed until on or about November 18, and was not adequately heated until a later date, and that this claimant expended \$2,620 in requiring facilities in substitution for this building. This is the item payment of which the Inspector General recommended, which recommendation this Board approved in its former decision.

The Government's obligations with reference to the building are set forth in paragraph 3 of the contract:

"3. The Government will provide a suitable building, with a floor space of not less than 7,500 square feet, for a central receiving and distributing station within the cantonment reservation, which will be suitably lighted and heated by the Government."

The Government did not engage to have this building ready for use by the contractor at any particular time, nor does it appear from the record that any representations were made that it was ready for occupancy. This claimant's president testified that he assumed it was ready, but it appears from the record that he did not inquire. It does appear that the claimant's president went to Camp Gordon

in September and ascertained that the building had not been erected and that the responsible officers had up to that time received no instructions to erect it. It does appear that orders for construction issued and that the building was furnished about November 16, 1917. It might be determined in an action against the Government for breach of contract in this respect that there was a breach, but as stated below this Board has no jurisdiction to decide and does not attempt to decide that point. Nor does it attempt to decide whether the claimant waived the said breach by proceeding to perform its obligations.

There is nothing in the record to show that any contract or agreement, whether oral or written, was entered into whereby the United States agreed, in consideration of the provision by the contractor of these facilities in substitution for those which the United States had agreed to furnish, to pay the expense of such substituted facilities.

MAY A SUPPLEMENTAL CONTRACT TERMINATING THIS CONTRACT OF SEPTEMBER 4, 1917, NOW BE ENTERED INTO?

It is insisted by the claimant that this contract is not executed or terminated, and that this Board has jurisdiction now to authorize a supplemental agreement providing for its termination, which agreement might provide for the payment to it of the damages it has suffered by reason of the Government's delay in providing the roads and building, and in heating the latter. It insists that its damages are liquidated because definitely ascertained and a matter of book account, and that in such case this Board has power to take the action suggested.

It is true that the Secretary of War may terminate an *existing* contract if such termination is in the interest of the Government, and may reasonably compensate the contractor for the surrender of his right to complete performance. This compensation may include recompense for damages whether liquidated or unliquidated occasioned by default of the Government.

Corliss Engine Co. v. United States (91 U. S. 321).

Burton's claim, 15 Comp. Decisions, 439.

Comptroller's Opinion, Nov. 25, 1918, par. 9.

This power of the Secretary of War rests upon the existence of a contract, and can not be exercised where the contract has been executed by performance, terminated by breach or otherwise. The default committed by the Government for which compensation is demanded must not have constituted a breach of contract accepted and treated as such by the contractor.

Is the situation with reference to this contract such that this Board may act within the powers of the Secretary of War as stated above? On March 4, 1918, W. E. Riley, the president of the claimant company, wrote Lieut. Col. Gallagher, the contracting officer, and Col. Evan Shelby, of the Construction Division, and the commanding general Camp Gordon, and the Depot Quartermaster, Southeastern Department, as follows:

"The failure of the United States to comply with the terms of this contract with the National Laundry Co., which contract was executed on behalf of the United States by Lieut. Col. Gallagher under date of September 4, 1917, prevents the National Laundry Co. from rendering the further services under said contract until said National Laundry Co. is compensated for the services rendered by it under this contract up to this time * * *. At the present time there is due us the sum of \$15,428.00 for which itemized statements have been presented, and as we are unable to procure the payment of the amount due under our aforesaid contract, we now hereby give notice we shall, and do decline to render further service under said contract until the amount justly due us for services heretofore rendered by us under said contract is paid. The United States of America has from its repeated practice, failed to comply with the terms of the aforesaid contract in many respects, but particularly in that it has failed; (1) to furnish to us facilities agreed to be furnished in said contract; (2) to deliver or permit us to collect a very large portion of the laundry in the contract specified; (3) to protect us in having exclusive laundry privileges at Camp Gordon; (4) to pay within a reasonable time our contract charges for said services rendered. As a result of the breaches of said contract by the United States, we have been subjected to the payment of sums in excess of \$15,000, which but for the actions and omissions in violation of the terms of said contract by the United States, we would not have expended.

"We are not now refusing to render further services until our claim for damages is settled, though we believe our claim for such damages should in fairness be speedily considered, but we do now refuse to render further service after this date under said contract until we are compensated to the extent provided for in said contract and orders issued thereunder for services heretofore performed by us under said contract. We regret the necessity of having to give this notice, but the United States has by its breach of our said contract made it imperative that our compensation for services heretofore rendered be paid before we can render further service under said contract."

It appears from the record that after this notice the claimant company abandoned efforts to further perform its contract, and that the commanding officer and other authorities at Camp Gordon acted on the belief that the claimant's contract was no longer in existence.

Furthermore it appears that the claimant's bills have not been paid; it states that it will proceed only in case its bills are paid; hence the conclusion that this contract has been terminated seems absolute.

Even if this were not the case, inasmuch as the contract by its terms endures only until June 30, 1918, unless renewed at the option of the United States under paragraph 9, and inasmuch as no option has been exercised prior to June 30, 1918, or since, it would seem undeniable that the contract has terminated and may not now be revived by any act of this Board.

Mr. Cary testifies, page 45:

"The Government has just as formally breached its contract by its actions as if it had notified us that it was not going to carry it out."

EFFECT OF ACT OF MARCH 2, 1919.

But the claimant insists that this Board has jurisdiction to award it fair and equitable compensation by virtue of the act of March 2, 1919, which act authorizes the Secretary of War to pay, adjust, or discharge upon a fair and equitable basis any agreement entered into by a person acting under his direction between April 5, 1917, and November 12, 1918, upon the faith of which expenditures were made or obligations incurred prior to November 12, 1918, if such agreements were not executed in the manner prescribed by law.

The claimant maintains that inasmuch as the affidavit prescribed by section 3745, Revised Statutes, was not attached to the contract and no return made to the Returns Office, Department of the Interior, the contract was not executed in the manner prescribed by law and thus falls within the act of March 2, 1919.

This Board in its former opinion discussed the effect of the omission of the affidavit prescribed by section 3745, United States Statutes. The *Henderson case* (4 Ct. Cls., 75) decided that the failure of the contracting officer to make his return of the contract in the Returns Office of the Department of Interior will not invalidate the contract. Inasmuch as the affidavit of disinterestedness which the contracting officer is required to execute is in connection with the formality of making the return, this Board has no hesitation in reiterating its opinion that the omission of the contracting officer to make such affidavit will not render this contract an agreement within the act of March 2, 1919. Even if the contract was informally executed that situation would not help the claimant. There was no agreement, express or implied, except the written agreement. (See also *Clark v. U. S.*, 95 U. S.)

DISCUSSION OF ITEMS.

It appears from the record that all the claimant's items of claim (except the item as to work done for the base hospital and the items of work done for officers and men), arise from alleged breaches of contract by the Government and are not capable of computation

based on any provision of the contract. They constitute claims for which resort must be had to the courts. As to them, the Secretary of War and this Board are without jurisdiction.

The item of claimant for work done for the base hospital, is capable of computation, from the contract, and has been computed. It is found to amount to \$1,204.53. See memorandum of March 19, 1919, signed "Chandos W. McMullen, 1st Lt., Q. M. C., U. S. A.," attached to the record herein. A shortage is alleged to exist into which alleged shortage further inquiry will be necessary. This item should be vouchered and paid under the contract.

The item of \$2,620, representing the expense of renting and equipping buildings in Atlanta, the hiring of labor, truck expense, etc., has been discussed. The office of the Inspector General recommended the payment of this item and this Board in its former decision authorized its payment. Both recommendation and authorization, however, were based, it is believed, upon an erroneous conception of law and must be set aside, for they are a part of the damages for breach of the contract above discussed.

The item of \$1,786.40, the amount of expense incurred on trips to Washington, etc., undertaken to persuade the Government officers to perform its contract, is clearly not allowable. These expenses were incurred by the claimant in connection with its efforts to persuade Maj. Shelby that it was not necessary to provide facilities for \$12,000 worth of work per week and to expedite the construction of the distributing building. They are not provided for in the contract, nor are they in any wise computable from any of its terms, nor has the Government ever agreed to pay these charges nor are there any facts in the record from which an agreement to pay may be implied either in fact or in law. This Board must, therefore, dissent from the memorandum of Lieut. Col. O'Brien, in so far as it recommends the payment of this item.

The item of excess of cost of bond, which bond is alleged to have been based upon an estimated business of \$12,000 per week, is clearly not allowable by this Board for the same reasons. It may be an element of damages for a breach of contract.

Claimant also demands payment of an item of \$7,378.77 which Mr. Cary testified (Rec., p. 50) arose in the following fashion:

"After we executed the contract with the Government and before we made arrangements with these Atlanta laundrymen for a minimum of volume of \$12,000 per week and while we had an option on the Guthman Laundry, a contract was tendered us by four of the prominent laundries of Atlanta which would have had a maximum volume of \$7,500 per week, the terms of that contract were that instead of our receiving 20% as we were going to have to accept if we made the contract with the laundrymen as a whole, that we were to receive 45%. I reported that situation. I came to Washington, re-

ported the situation to Major Shelby, told him that we were able to insure a volume of \$7,500 per week, and asked him if that would not be sufficient. He would not let me make a contract because I did not have a minimum of \$12,000. Now, had we been let alone with this contract which the Atlanta laundrymen tendered a draft of and said they were willing to execute, we would have been able to handle any volume of business and could have paid these gentlemen 55% instead of 80%. The difference on the business we got is \$7,378.77."

A reading of the contract in this case does not disclose any provision whereby Maj. Shelby had any power to determine what facilities the claimant should provide. It was the claimant's business to provide adequate facilities, and it was the judge in the first instance of what facilities were adequate for performance. The contractor was bound to

"furnish facilities to properly handle all the laundry work of the United States Government, and the officers and soldiers at the National Army Cantonment at Atlanta, Georgia, and do said laundry work to the satisfaction of the commanding officer of said cantonment."

The contract also provided—

"If the contractor failed to furnish the proper facilities and to perform the laundry work for the Government and the officers and soldiers at said cantonment to the satisfaction of the commanding officer of said cantonment, the Government shall have the right to have said laundry work done at any place where the same can be satisfactorily done, and the said contractor shall be liable to the contracting officer for any additional cost of such work when done elsewhere."

There is nothing in the record to show that the commanding officer of the said cantonment ever made any finding that the contractor should be required to furnish any particular amount of facilities, or ever demanded that the contractor should provide any particular amount of facilities. Maj. Shelby was not the commanding officer, and it can not be inferred from anything in the record that the commanding officer would have concurred in any recommendation Shelby might make with reference to the termination of this contract. The conversation testified to between Mr. Cary and Maj. Shelby amounts to no more than a declaration by Maj. Shelby that in his opinion claimant's estimate of the volume was too low. Maj. Shelby had no power to prevent the claimant making any contract it wished to make. The claimant accepted Shelby's judgment and preferred it to its own judgment in the matter.

Furthermore, there is no proof, nor does the claimant aver that Shelby ever agreed that the United States should pay any expense claimant might be put to by reason of its provision of facilities to

any particular extent, nor any other expense not provided for in the contract, nor is any such agreement inferable by implication from the language used or from the acts of the parties and the surrounding circumstances. It was Shelby's position that the claimant was required to furnish facilities sufficient to care for the laundry offered at Camp Gordon. It was his judgment that this would amount to \$12,000 a week, and that it was the contractor's obligation to supply facilities to that extent. Such was his estimate of the situation. This estimate, however, was in no wise binding upon the claimant. If it chose to accept his estimate instead of its own, it assumed the risk of error and can not now look to the United States to compensate it for its mistake of judgment in this respect.

But the claimant may maintain that by operation of law these circumstances will create an implied promise or quasi contract to compensate him for the said loss or for the expense he was put to in providing facilities to take care of a business of \$12,000 per week over the expense of facilities for \$7,500 per week.

The rule is that when the written agreement covers the subject matter (in this case the extent of facilities to be furnished), the law will raise no promise by implication which departs from the terms of the said agreement.

Cutter v. Powell (6 Term Reports, 324).

Walker v. Brown (28 Ill., 378).

Earle v. Coburn (130 Mass., 596).

Elliott Contr. Vol. 3, p. 598.

By the contract the claimant was obligated to furnish facilities adequate "to properly handle all of the laundry work for the United States Government and the officers and men" at Camp Gordon, "and do said work to the satisfaction of the commanding officer." If the facilities he proposed to furnish met this test, it would seem that no one had power to demand anything more. Mr. Cary testifies that Maj. Shelby would "not let" him make the contract with the four laundries because their capacity was less than \$12,000 worth of work per week, that Maj. Shelby threatened a cancellation of the contract unless facilities were provided to that extent, that thereupon and for that reason the claimant's officers abandoned the projected contracts with the four laundries at 55 per cent and made contracts with all the Atlanta laundries at 80 per cent of the claimant's prices. Maj. Shelby's testimony does not cover this point, but let it be assumed that the claimant's statements establish the facts. Will the law raise from these facts a promise to compensate the contractor for any expense thus put to over and above what expenses he would have had to meet if he had acted on his own estimate of the situation? The claimant estimated the Camp Gordon product at that time at \$7,500

per week. Maj. Shelby (let us assume) told Mr. Cary that if facilities to handle \$12,000 per week were not provided he would recommend the cancellation of the contract. Let it be assumed also that the commanding officer would have acted as Shelby might recommend. Will such circumstances raise such an implied promise? It would appear that Maj. Shelby's estimate of the necessities would not have been incorrect had not unforeseen factors affected the situation, to wit, the delay of the Government in providing the distributing building, the delay in providing roads, the claimant's consequent difficulties in giving the service, the exasperation of officers and men against the claimant by reason of the quality of the service, the reluctance of company officers to collect the claimant's bills, bitter competition by other laundries and by washwomen, which competition, it appears, the commanding officer did what he could to choke off. All these circumstances affected the volume of business and tended to reduce that offered to the claimant. It would appear that in spite of all this \$12,000 or more of work would have been offered had the claimant's capital been larger and its patience greater. The building was finally completed, equipped and heated, military pressure was applied to exclude competition and compel collections. Mr. Riley states (Rec., p. 119) :

"If memorandum No. 36 had been carried out strictly and the building had been ready on time we would not have lost any money. If they had not taken the contract away we would have made \$150 to \$175 per week. They took it away when the base hospital work ran up to \$3,000 and \$4,000 per week. I want to explain the notice that we gave the Government that we could not go ahead. Mr. Cary wrote the notice (i. e., the letter giving notice of termination in March, 1918). I took it out to camp headquarters. Maj. Crank took the matter up. I told him about the condition and the fact that we could not get our money. He said he would try to force collection [of soldiers and officers accounts]. He did try, but it did not seem to make much difference about the character of the military authority, for the money did not come. It was suggested at that meeting if the company could not go ahead what about me going ahead. I said I could not do that, that I did not have the finances, that I could not go ahead. Headquarters wanted me to go ahead if the company could not go ahead. I could not go ahead. I did not have but about \$25,000 to carry it on. Every week a man had to pay out \$2,000 or \$3,000."

This testimony of Mr. Cary with reference to the claimant's finances and the letter of termination make the conclusion almost irresistible that the reason for the termination was the claimant's lack of sufficient capital and not the failure of the camp to produce \$12,000 of work a week for the claimant's purposes.

It can not be said with confidence that there was any breach of Maj. Shelby's promise (if he made it), that the camp would offer

to the claimant \$12,000 per week. Such a promise or prophecy was based upon the assumption that all conditions affecting the volume of laundry would be normal and that the claimant itself would be equipped for performance, including the possession of sufficient capital to tide it over the difficult early period of the contract. Under these circumstances this Board must hold that the facts in the case do not raise a promise implied in law or otherwise on the part of the Government to compensate claimant for such damages as it might suffer by reason of the failure of Camp Gordon to produce \$12,000 of laundry per week to the claimant's uses.

The claimant had the opportunity to refuse to proceed with its contract unless the Government would enter into a supplemental contract modifying the original in such manner as it saw fit. Having omitted to do this for the reason, as it would appear, that it preferred to proceed in the hope of recouping itself in the future, which hope seems to have been defeated by reason of its lack of sufficient capital, this Board is now without power to give it any relief except the adjudication of its bill against base hospital.

The item of \$5,840, representing the increase of pay roll over what it would have been had the contractor been required to provide only for what the camp did produce, must be denied for the reasons set out above.

The item of \$40,000, an estimate of profits, is not allowable. The items of claim against individual officers and men are not enforceable against the United States. The contract contains no provision which makes the United States responsible for these obligations. The office of The Adjutant General will, however, afford the claimant its assistance in collecting these charges.

DISPOSITION.

The decision and the papers herein will be transmitted to the Claims Board, Office of the Director of Purchase, for adjudication of the unpaid balance due it from the United States on account of the performance by it of laundry work for the base hospital at Camp Gordon at the rates specified in the schedule attached to the said contract of September 4, 1917, subject to such proper reduction on account of shortage as may be found to exist, and for such action as will secure the payment to the claimant of the amount thus ascertained to be due.

Col. Delafield, Mr. Eaton, and Mr. Bryant concurring.

Case No. 2166.

In re CLAIM OF CHARLESTOWN SAND & GRAVEL CO.

1. **NET PROFIT.**—Under an express oral contract that the Government should pay such a price for materials delivered as would secure the contractor a net profit of 25 cents per ton, in determining such profit due allowance must be made for expenditures for special facilities ordered by the Government or made necessary by its requirements and worth less to claimant than their cost.
2. **INFORMAL PRESENTATION OF CLAIM.**—Where a claim was not formally presented until after June 30, 1919, but was presented by invoices prior to that date, it was presented within the period fixed by the act of March 2, 1919.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an express oral contract for sand and gravel. Held, claimant is entitled to relief.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim on Form B has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17 (1919), for \$30,542.78, by reason of a verbal agreement alleged to have been entered into between the claimant and the United States.
2. The claim in this case was not filed with this Board until October 21, 1919, but it was presented by invoices before June 30, 1919, and by letter to Maj. J. F. O'Hara, Ordnance Department, contract section, at Aberdeen Proving Grounds, under date of February 6, 1919. A hearing has been had before this Board.
3. On or about May 1, 1918, the Government took possession of the claimant's gravel pit and plant, which was voluntarily surrendered in view of a condemnation suit previously begun by the Government under section 120 of the national defense act. By direction of Government officers, the claimant operated its plant until shortly after the signing of the armistice, turning over to the Government such part of the output as the Government could take, the same constituting about 66 per cent of its entire production.
4. Claimant had received notice of the condemnation proceedings through a letter dated April 25, 1918, from Maj. H. U. Wallace, of

the Engineer Corps, in the Construction Division of the Army, who had the claimant's officers come to Washington to arrange the details of taking over the plant. He assured the claimant it should receive a reasonable profit, which was to be 20 cents or 25 cents per ton on all the sand and gravel taken by the Government, but stated that a tentative price would be fixed which would be subsequently increased, or, if necessary, decreased, to effectuate this understanding. He fixed the tentative price at \$1 per ton for both sand and gravel and subsequently agreed with claimant that its profit on material furnished the Government should be 25 cents per ton.

5. In August the price of both sand and gravel was reduced to 60 cents per ton, and claimant found it was losing money. The price of sand was accordingly raised to 70 cents and gravel to \$1.25. At these prices claimant lost money.

6. Maj. Wallace referred the adjustment with claimant to Maj. Arthur B. Roberts, Ordnance Department, assistant constructing officer at the Aberdeen Proving Grounds, who testified at the hearing before this Board. He conducted a large part of the negotiations with the claimant.

7. Maj. Wallace and Maj. Roberts finding upon an analysis of the claimant's costs that it was losing money, finally fixed a tentative price for both sand and gravel of \$1.40 per ton, beginning October 1, 1918, and recommended that the claimant bill back from July 1 at that rate so as to cover the deficit and bring the net profit up to the amount promised. They both consider the claimant fairly entitled to the amount claimed.

8. Subsequently, the War Industries Board, having appointed a board of appraisal to set the prices in that district for different commodities, the matter of readjusting the tentative prices was referred to it, but was by it afterwards referred back to Maj. Wallace. Meanwhile Maj. Roberts had left the service and Maj. Wallace left shortly afterwards, and the final prices have not yet been settled.

9. In the period from July 1, 1918, to the end of the year, the usual and customary prices in this district were, for sand \$1.40, and for gravel \$1.45 per ton. During this period the claimant was frequently offered these amounts, and sometimes more, but was compelled to decline the offers because of the Government requirements.

10. The claim is based upon the tonnage delivered between July 1, 1918, and the end of September, 1918, and is for the difference between the amount paid the claimant and the amount which would have been paid it at \$1.40 per ton for the material delivered. The claimant states that it would be entitled to something further for sand and gravel furnished prior to July 1, and would be entitled to reimbursement for a trestle constructed by order of the Government at an expense to claimant of about \$3,000. Reference is made in its statement

of claim to the cost of certain other facilities amounting to \$15,740. Claimant states that it makes no claim for settlement based on these items but that it makes claim only on the basis above set forth. It does not appear that any audit has been made on behalf of the Government.

DECISION.

1. The claim on Form B was not filed until after the time limit fixed by the act of March 2, 1919. It was presented, however, long before June 30, 1919, by invoices, to Maj. Wallace and Maj. Roberts, and in February, 1919, by letter to Maj. O'Hara, and was, therefore, presented within the period fixed by law.

2. There appears to have been an express oral contract entered into between the Government and the claimant that its compensation should be such amount per ton of material delivered to the Government as would give it a net profit of 25 cents per ton thereon. In so far as the evidence discloses, the amount claimed is probably less than it would receive on the basis of its contract.

3. The claimant must be limited in its recovery to the contract price. The contract price is such price as will give it a profit of 25 cents per ton on all material delivered to the Government. In determining such profit, however, due allowance must be made for all expenditures made by claimant for special facilities ordered by the Government or made necessary by its requirements and worth less to claimant than their cost. Should claimant's profit, thus determined, fall short of the claim as computed on the basis on which it is presented, the claim should be reduced by such shortage.

DISPOSITION.

This Board will cause the amount due to the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division, and will make the statutory award, and cause the same to be executed on behalf of the United States and by the claimant, and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Henry concurring.

Case No. 1896.

In re CLAIM OF THE J. G. WHITE ENGINEERING CO.

1. **CONSTRUCTION WORK CONTRACT—MAXIMUM FEE—RIGHTS OF PARTIES.**—Where claimant entered into a contract to do the construction work on the aeronautical station at Langley Field, Va., on the cost-plus plan, the Government paying for labor and material, and where such contract fixed claimant's maximum fee at \$250,000, the claimant is not entitled, under the act of March 2, 1919, to a larger fee than the maximum fee fixed by the contract, where he did no work that he could not have been required to do under the contract.
2. **CLAIM AND DECISION.**—This claim for \$54,358 arises under the act of March 2, 1919, and is presented upon the theory that claimant was required to do additional and extra work in such amount in excess of the maximum fee of \$250,000. Held, that claimant did no work that it was not required to do under the terms of its contract and that claimant is not entitled to the relief sought.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$54,358, by reason of an agreement alleged to have been entered into between claimant and the United States. This case grows out of the following facts and circumstances:

1. Under date of June 20, 1917, petitioner, the J. G. White Engineering Co., entered into a formal contract (Ord. No. 8451) with the United States (by C. G. Edgar, captain, Signal Corps, United States Army, contracting officer), by which, among other things, it was provided as follows (the typewritten portions of the printed contract appearing here in italics):

“ARTICLE I.

“EXTENT OF THE WORK.—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

“*The construction of an aeronautical experiment station at Langley Field near Hampton, Virginia, in accordance with the plans and specifications of Albert Kahn, of Detroit, Michigan, in accordance with the drawings and specifications to be furnished by the contracting officer, and subject in every detail to his supervision, direction, and instruction.*

"The contracting officer may, from time to time, by written instructions or drawings issued to the contractor, make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications. The contractor shall comply with all such written instructions or drawings.

* * * * *

ARTICLE III.

"**DETERMINATION OF FEE.**—As full compensation for the services of the contractor, including profit and all general overhead expense, except as herein specifically provided, the contracting officer shall pay to the contractor in the manner hereinafter prescribed a fee to be determined at the time of completion of the work from the following schedule, except as hereinafter otherwise provided:

"If the cost of the work is under \$100,000.00 a fee of ten per cent (10%) of such cost.

"If the cost of the work is over \$100,000.00 and under \$125,000.00 a fee of \$10,000.00.

"If the cost of the work is over \$125,000.00 and under \$250,000.00 a fee of eight per cent (8%) of such cost.

"If the cost of the work is over \$250,000.00 and under \$266,666.67 a fee of \$20,000.00.

"If the cost of the work is over \$266,666.67 and under \$500,000.00 a fee of seven and one-half per cent ($7\frac{1}{2}\%$) of such cost.

"If the cost of the work is over \$500,000.00 and under \$535,714.29 a fee of \$37,500.00.

"If the cost of the work is over \$535,714.29 and under \$3,000,000.00 a fee of seven per cent (7%) of such cost.

"If the cost of the work is over \$3,000,000.00 and under \$3,500,000.00 a fee of \$210,000.00.

"If the cost of the work is over \$3,500,000.00 a fee of six per cent (6%) of such cost.

"Provided, however, that the fee upon such part of the cost of the work as is represented by payments to subcontractors, under subdivision (b) above, shall in each of the above contingencies be five per cent (5%) and no more of the amount of such part of the cost.

"The cost of materials purchased or furnished by the contracting officer for said work exclusive of all freight charges thereon, shall be included in the cost of the work for the purpose of reckoning such fee to the contractor, but for no other purpose.

"The fee for reconstructing and replacing any of the work destroyed or damaged shall be such percentage of the cost thereof—not exceeding seven per cent (7%)—as the contracting officer may determine.

"The total fee to the contractor hereunder shall in no event exceed the sum of \$250,000.00, anything in this agreement to the contrary notwithstanding."

2. The Government undertook to pay, and did pay under the terms of this contract, all costs of labor, material and overhead, so that any fee to be received, or which was received, by the petitioner was net.

3. The building of this aeronautical experiment station at Langley Field, Va., was an enterprise that had had the attention of Congress before the entrance of this country into the war. It was to be, as one witness described it, "the West Point of aviation," a permanent field with permanent buildings, ways and works, as distinguished from a large number of temporary flying fields erected or constructed during the emergency of the war and for war purposes only. The plans and specifications for Langley Field, together with drawings and layout, were made up in elaborate detail by Mr. Albert Kahn, architect, of Detroit, Mich.

4. At the time the petitioner entered into the contract aforementioned, the ultimate cost of the project was more or less problematical. It is shown in evidence that Gen. Squier estimated the cost would be about \$3,283,500. It is shown in evidence also that the opinion was expressed to agents of petitioner by Lieut. Col. C. G. Edgar, of the Signal Corps, who had charge of aviation construction work, that this estimate was far too low. At the time of entering into the contract the petitioner had seen the general plans and lay-out as made up by Mr. Kahn and knew the general character and nature of the buildings and other work to be done at Langley Field, and the petitioner was in as good a position to estimate the cost of the work as were the Government agents.

5. At about the time of the execution of the written contract, or perhaps a short time before that, the petitioner began work upon Langley Field. A short time after the work was begun, and after this country had gotten into the full swing of the war, the Government agents decided to abandon certain of the permanent structures, as outlined in the original plans and specifications, and to substitute in their place buildings and work of a temporary nature to be made available for immediate use of troops. Orders for this temporary and substituted work were given by the Signal Corps, and this temporary and substituted work was carried on simultaneously by the petitioner with the construction of the permanent work and with the same force and organization engaged in the permanent work, and the temporary and substituted work was executed by petitioner under all the terms, conditions, and restrictions contained in the written contract of June 20, 1917.

6. The contract of June 20, 1917, was suspended and terminated by the Government of the United States on the 15th day of August, 1918, when about 60 per cent of the permanent work contemplated thereunder had been completed, and the petitioner's force and organization left Langley Field and did no more work there.

7. The petitioner spent at Langley Field, as the cost of the permanent work done, as well as the temporary and substituted work, approximately the sum of \$6,200,000. It is alleged by petitioner that

of this amount approximately \$5,641,000 was spent on the work of a permanent nature as contemplated under the contract of June 20, 1917, and for which alone it is alleged petitioner was entitled to receive a fee of \$250,000; and that \$853,971.20 of said amount was spent in the construction of substituted and temporary work which was not contemplated under the terms of the contract of June 20, 1917, and that for this additional and substituted work petitioner is entitled to an additional fee to be ascertained from a scale of percentages identical with that contained in the written contract, subject to any identical provisions modifying the same. Petitioner therefore claims that on account of the cost of this substituted and temporary work it is entitled to a fee of \$54,358 or approximately 7 per cent of such cost.

8. It is not known, of course, with any degree of accuracy, what it would have cost the Government of the United States to have completed Langley Field as contemplated in the contract of June 20, 1917. The most conservative estimates place such total cost well beyond \$8,000,000. By a statement made up by the Liquidation Division of the Air Service, and filed in the papers of this case, it is estimated that to have completed the buildings and work called for in the original plans and specifications would have required a total expenditure of \$8,093,550.

DECISION.

1. The sole question presented here for determination is whether or not the petitioner is entitled to an additional fee based upon the cost of the substituted and temporary work, and apart from the fee of \$250,000 which has been paid for under the terms of the contract of June 20, 1917.

2. The contract of June 20, 1917, called for—

“the construction of an aeronautical experiment station at Langley Field, near Hampton, Virginia, in accordance with the plans and specifications of Albert Kahn, of Detroit, Michigan.”

The said contract also provides that—

“The contracting officer may, from time to time, by written instructions or drawings issued to the contractor, *make changes in said drawings and specifications, issue additional instructions, require additional work, or direct the omission of work previously ordered*, and the provisions of this contract shall apply to all such changes, modifications, and additions with the same effect as if they were embodied in the original drawings and specifications.”

3. This Board is of the opinion that petitioner is not entitled to any additional fee over and above the \$250,000 which has already been paid under the terms of the written contract. The only interest

that petitioner had in Langley Field was in the fee which was to be received and which was to be based in the main upon the sliding scale of percentages to be determined by the cost of the work, but in no event to exceed \$250,000. The cost of the work at Langley Field, therefore, was the sole matter in which petitioner was interested in a legal sense. Petitioner entered into the contract of June 20, 1917, and agreed to do the work contemplated under that contract, which would have cost the Government of the United States certainly more than \$8,000,000, with the distinct understanding that even at such a cost in labor, material, and overhead, petitioner should receive only \$250,000 fee. There can certainly be no question but that the Government could have compelled the petitioner to have completed the field, even at a cost of more than \$8,000,000, for a total fee of \$250,000, so that any changes in the plans and specifications or elimination or substitution of work which did not increase the cost beyond the amount which the Government could have called for under the contract, and which petitioner could have done and did do with the same force and organization would not have placed upon the petitioner any greater burden than was resting upon petitioner under the terms of the written contract.

4. The contracting officer had a right to call for changes in plans and specifications, and for additional work, or for the omission of work previously ordered. The substitution of the temporary and less expensive work for the permanent work was done by the Government agents with the knowledge of the petitioner and with petitioner's apparent consent and without any protest in respect to such substitution. So long as the total cost of the work required of petitioner at Langley Field was less than the cost of the work that could have been called for under the written contract, petitioner had no right to complain, and did not complain. This case is to be distinguished from Case No. 1895, heretofore decided by this Board in favor of petitioner on the 20th of January, 1919. In that case there was no substitution of less expensive for more expensive work, but in that case radically different work was called for which involved additional cost, and it was held by this Board that, under the terms of a contract similar to the one here in question, the contracting officer had no right to call for the changes in the plans and specifications or for additional work that involved additional cost for which no provision was made in the contract for the payment of the additional fee. In this case, however, there was a substitution of less expensive for more expensive work, which substitution was made certainly with the tacit consent of petitioner, and since the only interest which petitioner had in the work at all, in a legal sense, was the fee to be received, depending upon the cost of the work, and the tempor-

ary or substituted work was done with the same force and organization simultaneously with the construction of the permanent work, and the total work done at Langley Field by the petitioner, including the permanent as well as the temporary and substituted work, was far less than that which could have been called for under the terms of the written contract, this Board is of the opinion that, under the circumstances of this case, a rational interpretation of the contract of June 20, 1917, is that the contracting officer had a right to substitute less expensive for more expensive work without involving upon the part of the Government an obligation to pay a fee in excess of the amount authorized in the written contract.

5. For the reasons above stated, all relief asked for in this case must be denied.

DISPOSITION.

A copy of this finding of fact and decision will be transmitted to the Claims Board, Air Service, for its information.

Col. Delafield and Mr. Shaw concurring.

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Case No. 1705.

***In re* CLAIM OF ARTHUR VULCANIZING MACHINE CO.**

1. **INFORMAL CONTRACT.**—Where claimant, under a procurement order, was supplying a certain number of machines, and claimant received from the Government oral instructions to supply certain equipment for each machine, and which was not specified in the original order, and in compliance therewith claimants supplied equipment for a portion of the machines which was received and accepted by the Government, and also made expenditures for supplying the remainder of the equipment, there resulted an implied contract by which the Government was obligated to pay for the equipment received and accepted and to compensate claimant for losses sustained.
2. **CLAIM AND DECISION.**—Claim is made under act of March 2, 1919, for \$4,322.41 for tools and spare parts. Held, that claimant is entitled to recover. •

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 by the Arthur Vulcanizing Machine Co. for \$4,322.41, the purchase price of certain tools, spare parts, and other equipment delivered to the Government in connection with Arthur vulcanizing machines covered by Procurement Order L-495-J, issued by the Quartermaster Corps, United States Army, under date of October 16, 1918.

2. Mr. Paul B. Masters, secretary and treasurer of the claimant, was employed by the Government and sent to France to investigate the possible advantage of installing vulcanizing equipment in repair shops of the American Expeditionary Forces and consider the requirements of such installation. Shortly after his return to this country a cable requisition was received by the Quartermaster General asking that 100 machines and appropriate tools, spare parts, and equipment be forwarded to France.

3. In conversation with Mr. Masters, Mr. Robert W. Karla, buyer of the shoe and shoe supply branch, Clothing and Equipage Division, Quartermaster Corps, placed an order for 25 vulcanizing machines with the claimant. Shortly thereafter this order was increased to 50 and was included in Procurement Order No. L-495-J, issued on

October 16, 1918, for 100 machines. The procurement order did not specifically include any tools, spare parts, or other equipment.

4. Mr. Masters testified that when the first order for 25 machines was placed Mr. Karla directed him to include such tools, spare parts, and other equipment as his observation in France made him think necessary to the most efficient operation of the machines in France. Mr. Karla, on the other hand, testified that at this conference he asked Mr. Masters to furnish a list of such tools, spare parts, and other equipment, together with the names of other sources from which they might be procured. Mr. Karla wished to save the Government the expense of purchasing through the claimant.

5. When the order was increased and later, when the procurement order was issued, Mr. Masters assumed that the tools, spare parts, and other equipment necessary to the efficient operation of the machines were intended to be included.

6. Sometime in October Mr. Masters advised Mr. Karla that he had 30 machines ready for shipment and asked for instructions as to tools, spare parts, and other equipment for these machines. Mr. Karla testified that, for the purpose of effecting an early delivery of complete working units, he decided to have the claimant furnish the necessary incidental material for the machines then ready for delivery and to purchase such material for the 70 machines yet to be delivered in the open market.

7. When the claimant offered the 30 machines and incidental equipment for acceptance the Government inspector did not regard the procurement order broad enough to justify the acceptance of the tools, spare parts, and other equipment and called Mr. Karla on the long distance telephone. Mr. Karla gave the necessary authority to the inspector to accept the extra material.

8. Immediately after his latest conversation with Mr. Karla Mr. Masters procured the tools, spare parts, and other equipment which he regarded necessary for the efficient operation of 100 machines. Some of this material was delivered with the 30 machines originally accepted by the Government and some of this material was shipped in advance, for use with machines remaining to be delivered.

9. After the armistice the performance of the contract was suspended and an agreement was entered into under which the claimant was allowed to deliver 35 additional machines, making a total of 65 machines accepted by the Government under the contract. The inspector regarded Mr. Karla's telephone instructions as authority for accepting the tools, spare parts, and other equipment necessary for the 35 machines subsequently delivered and permitted shipment of this material independent of the machines not yet completed and ready for delivery.

DECISION.

1. It is the opinion of this Board that an agreement was entered into with the claimant under which it would have been required, had the contract been completed, to deliver such tools, spare parts, and other equipment as would have been necessary for the efficient operation of the vulcanizing machines in France, and it is entitled to be paid for such equipment as is incidental to the 65 machines heretofore delivered to and accepted by the Government.

2. Claimant is also entitled to be held harmless against loss by reason of having purchased the tools, spare parts, and other equipment necessary for the 35 machines, delivery of which was excused under the settlement agreement.

DISPOSITION.

1. This Board will cause the amount due to the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage and Traffic Division and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield, Mr. Patterson, and Mr. McCandless concurring.

Case No. 1708.

In re CLAIM OF FRICK CO.

1. **LABOR AND MATERIALS—COST-PLUS AGREEMENT.**—Where an officer of the Government orally orders the installation of a chlorine plant on the understanding that materials are to be furnished and that the work is to be done at cost plus a percentage, there is an agreement such as will obligate the Government to pay a reasonable price, which in this case is found to be a reasonable price for the materials and the cost of labor, plus a profit of 10 per cent on such cost of labor.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for work done and materials furnished in installing a liquid chlorine plant at Edgewood Arsenal under an oral agreement, which did not fix the price. Held, claimant is entitled to a reasonable price for the materials and 10 per cent profit on the cost of labor.

Mr. Harding writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim was filed with the Board of Contract Adjustment at the Edgewood Arsenal, Edgewood, Md., in April, 1919, and was forwarded to this Board by the Director of Chemical Warfare Service. A verbal order was given to the claimant on or about the 30th day of October, 1918, by Robert W. Weeks, then first lieutenant, Chemical Warfare Service, United States Army, for the extra installation of a liquid chlorine plant at the Edgewood Arsenal, Edgewood, Md., consisting of—

Ammonia lines to chlorine bottles.

Placing tees in brine lines for mercury wells.

Hanging brine mains and headers.

Erecting brine pumps and also mains to chlorine.

Condensers and brine coolers and connections to same.

The installation was ordered by Lieut. Col. Chas. F. Vaughn, officer in charge of the chlorine section at the arsenal, and was approved by Maj. D. J. Demorest. The materials were to be furnished and the work done at cost plus a percentage. Lieut. Robert W. Weeks, in giving the order, was acting under the directions of Lieut. Col. Chas. F. Vaughn. The materials and labor were furnished and the work

done by the petitioner under the personal inspection and supervision of Capt. R. A. Hungerford, Chemical Warfare Service, United States Army, who approved the work and certified to the correctness of the cost of same. The work was begun and commitments thereon made prior to November 12, 1918, and the Government took over the plant.

2. No price was specified for the work to be done and the materials furnished other than that the labor was to be for cost plus a reasonable compensation for superintendence. The claim is made for \$1,828.31, which amount both Lieut. Col. Vaughn and Capt. R. A. Hungerford, Chemical Warfare Service, United States Army, certified by their affidavits to be correct.

DECISION.

1. The above state of facts evidences a contract between the claimant and the Government whereby the claimant was to furnish the materials and do the work required of it under the order set forth in the findings of fact, and in consideration thereof the Government agreed to pay the claimant a reasonable price, which consisted of a reasonable price for materials and the cost of labor, with a reasonable compensation for superintendence, which this Board, under the circumstances of the case, fixes at 10 per cent of the cost of the labor furnished and paid for by the petitioner. The claimant has performed its agreement in all respects and the Government is now in possession and enjoyment of the plant installed by the claimant, and is now indebted to the claimant in a reasonable amount, to be ascertained as above set forth.

DISPOSITION.

This Board will formulate the document setting forth the nature, terms, and conditions of the agreement between the claimant, Frick Co., and the United States, and will execute its certificate, Form C, as prescribed in Supply Circular No. 17, revised March 18, 1919, and will draw up a statutory award causing the same to be paid.

Sent to award section for appropriate action.

Col. Delafield, Mr. Williams, and Mr. Howe concurring.

Case No. 1601.

In re CLAIM OF THE SUSQUEHANNA WEBBING CO.

1. **UNDERSTANDING FOR CONTINUOUS PRODUCTION.**—Where it was understood between the contractor and the Government that production was to be continuous, and that the Government would take all the goods the contractor could produce, the latter is justified in proceeding without waiting for the formal contract.
2. **MEETING OF MINDS.**—Where both parties considered that their minds had met in an agreement which was clear and definite as to its terms, and acted prior to November 12, 1918, on the basis of that agreement, there was an agreement within the provisions of the act of March 2, 1919, even though the written acceptance of the terms of the contract was dated November 12, 1918.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an express agreement for the manufacture of halter webbing. Held, claimant is entitled to relief.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case comes on appeal from the Claims Board, Director of Purchase. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$7,105.13, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. In 1918 the demand for webbing exceeded the supply. The webbing section of the cotton-goods subdivision of the Clothing and Equipage Division was constantly endeavoring to secure increased facilities among the manufacturers. They understood this and co-operated with the Government. They proceeded to execute contracts on recommendations for awards, otherwise the large requirements of the Army could never have been so nearly met.
3. Early in 1918 the Government gave the claimant a contract and, its output proving satisfactory, instructed it from time to time to keep its looms in continuous operation. A contract was then given claimant for 100,000 yards of halter webbing, and this was increased to 200,000 yards. When the output of the factory overran the order by some 15,000 yards, this excess was taken by means of a purchase order.

4. Claimant was urged to change four of its looms, made for light goods, so that they would be suitable for weaving halter webbing. This necessitated a complete reconstruction of the looms and was done on the faith of orders then in process of manufacture and others to be received.

5. About the end of October, 1918, the claimant was about to begin on a contract for 200,000 yards, which had been verbally agreed upon, but which had not been signed because, through a mistake of the webbing section, the contract as drawn erroneously stated the specifications. In an interview between Lieut. Mathewson, of the webbing section, and claimant's manager, Mr. Magee (who died shortly prior to the hearing before this Board), it seems to have been understood that, inasmuch as the four reconstructed looms would shortly be in operation, claimant's production would amount to about 75,000 yards per month, and that the pending order for 200,000 yards should be accordingly increased to 300,000 yards, deliveries to be made at the increased rate, beginning with December.

6. Owing to the earlier mistake of the webbing section as to the specifications, there was some correspondence leading up to a letter from Lieut. Mathewson, dated November 5, 1918, to the claimant. His letter stated that the contract for 200,000 yards would be canceled, and that he noted the claimant would accept an additional contract for about 300,000 yards. The letter stated the specifications for this contract correctly and added: "You are requested to acknowledge this letter, advising if this understanding is correct. If so, a contract along these lines will be sent you, subject to the usual approvals." Claimant received the letter November 6, 1919.

7. There was a shortage at this time of the yarn required for this webbing, and the claimant, on receipt of this letter, made its commitments before mailing a reply. Under date of November 12 it replied, noting the cancellation of the 200,000-yard order, acknowledging the correctness of the specifications for the 300,000-yard order, and adding:

"Will you kindly let us have our contract for this as promptly as possible, as our yarn is commencing to come in, and we want to keep up our quota of 75,000 yards per month."

Under date of November 14 the webbing section replied that the material would not be required.

8. Reconstruction of the four looms was completed, and they were started shortly before the notice that no further webbing would be needed, but no material of any consequence was manufactured on them.

9. Under date of November 5, 1918, Lieut. Mathewson forwarded a recommendation signed by his superior, Maj. Richmond, for the

300,000-yard order, and under date of November 11, 1918, the purchasing department issued an abstract thereof. This abstract was the document sent to the inspectors advising them that a formal contract had been made and that the manufacture thereunder was subject to their inspection.

DECISION.

1. This claim appears to have been rejected on an assumption that there was no acceptance of the order contained in the letter of November 5 until November 12. The question for this Board is whether the minds of the parties met on the terms of the contract prior to November 12.

2. The untimely death of claimant's manager, Mr. Magee, made it impossible for claimant to establish a telephone conversation between him and Lieut. Mathewson, which is said to have taken place before November 12, but which Lieut. Mathewson does not remember.

3. If there were no circumstances in the case other than the letters of November 5 to the claimant and the claimant's reply of November 12, it would be clear that the contract was consummated on November 12 and did not exist prior to that date. Unless there is some further element in the situation which placed the claimant under obligation to proceed before November 12, 1918, with its commitments, and to manufacture under the 300,000-yard order, it is not entitled to relief under the act of March 2, 1919.

4. It had long been distinctly understood between the Government and the claimant that the latter was to keep up continuous production and to increase production as far as possible. It was understood that the four reconstruction looms were about ready for operation. It was understood that claimant should have an output of 75,000 yards per month for the four months beginning December 1, 1918.

5. There appears to have been no confusion as to the understanding between claimant and the Government concerning the specifications, but there had been errors on the part of the Government in stating this understanding in the formal contracts; hence the statement of the specifications in Lieut. Mathewson's letter of November 5 and the request for an acknowledgment of that letter.

6. There is a clear inference from the circumstances that had the letter of November 5 misstated the specifications, it would have been, nevertheless, the duty of the claimant to purchase materials and operate its looms on the 300,000-yard order. The Government would have been obligated to amend the statement of the specifications to conform to the understanding definitely established by previous interviews and by the course of dealing.

7. Both parties seem to have acted on the letter of November 5 without waiting for the reply. The commitments by claimant prior to November 12 evidence its action. The action of the Government is evidenced by a recommendation for the contract forwarded by Lieut. Mathewson on November 5, and the issuance of the abstract of the contract prepared by the Government for the inspectors under date of November 11. It is, therefore, clear that the minds of the parties met before November 12, 1918, on a contract for 300,000 yards of the specified webbing at a fixed price and terms of delivery, and claimant is accordingly entitled to relief.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hunt concurring.

Case No. 736.

In re CLAIM OF THE LIBERTY COTTON OIL CO.

1. ORAL AGREEMENTS — RECISION — CONSIDERATION, FAILURE OF.—

Where a representatives of the War Industries Board promised a manufacturer to furnish raw linters at a certain price if the manufacturer would sell certain bleached linters it had on hand for delivery to the Canadian Government, which the manufacturer agreed to do, but which bleached linters were rejected by the munitions contractor because such bleached linters did not meet the specifications, and a new agreement was entered into between claimant and the munitions contractor whereby claimant was to furnish entirely different bleached linters, thus leaving the claimant possessed of the linters which he was requested by the Government to sell to the munitions contractor, there is a failure of consideration for the agreement by the War Industries Board to furnish raw linters at the fixed price, and claimant can not recover the difference between the price so fixed and what it was compelled to pay for linters in order to fill the subsequent agreement with the munitions contractors.

2. CLAIM AND DECISION.—Claim under the act of March 2, 1919, for the difference in price at which raw cotton linters were agreed by a representative of the War Industries Board to be furnished claimant and the price claimant was compelled to pay therefor. Held, claimant not entitled to relief.

Mr. Williams writing the opinion of the Board.

FINDING OF FACTS.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$7,980 by reason of an agreement alleged to have been entered into between the claimant and the United States. This case grows out of the following facts and circumstances:

1. On the 14th day of June, 1918, a large number of the bleachers of raw-cotton linters in this country, including the petitioner, had a conference in the office of Mr. George R. James, chief of the cotton and cotton linters section of the War Industries Board, with a view to agreeing upon a price at which bleached cotton linters were to be sold. A tentative agreement had already been entered into between the Cotton Seed Crushers (producers of raw linters) and the War Industries Board that the price at which Cotton Seed Crushers would

sell raw linters, out of which bleached linters are made by the process of refinement, would be \$4.67 per hundred pounds f. o. b. points of production. Through the medium of what was called the linter pool, an undertaking was effected by which the Cotton Seed Crushers would receive \$4.67 per hundred pounds of raw linters at the points of production, but that, in order to equalize freight and other charges throughout the country, the party buying raw linters, should be required to pay \$6 per hundred pounds delivered. It was in connection with these matters that an effort was made to reach an agreement as to the price which bleachers of cotton linters should charge for the finished product. It is clear, however, that at the conference of June 14, 1918, no agreement was entered into respecting the price at which bleachers should sell their bleached linters.

2. It is alleged by petitioner, however, that at that meeting petitioner submitted a statement of costs of raw material, labor, etc., which justified a selling price of bleached cotton linters at \$14.33 per hundred pounds. Petitioner alleges further that at the time this conference took place Mr. George R. James introduced him to Mr. J. T. Skelly, vice president of the Hercules Powder Co., who desired to buy some bleached linters, and that Mr. Skelly objected to the price of \$14.33 per hundred pounds, and that thereupon Mr. James agreed with petitioner's president, Mr. Joseph F. Rumsey that if petitioner would sell at the price of \$12.25 per hundred pounds 1,000 bales of bleached linters which petitioner had on hand at that time, to be used in the filling of a contract with the Canadian Government, Mr. James would guarantee that petitioner would secure at \$4.67 per hundred pounds f. o. b. its plant 1,200 bales of raw-cotton linters with which to replace the 1,000 bales of bleached linters so sold. And it is alleged that the 1,000 bales of bleached linters were thereupon sold to the Hercules Powder Co. at the price of \$12.25 per hundred pounds, and that petitioner was required to purchase in the open market at \$6 per hundred pounds f. o. b. its plant 1,200 bales of raw linters from which to manufacture and replace the said 1,000 bales of bleached linters. The difference between the \$4.67 per hundred pounds and \$6 per hundred pounds on 1,200 bales of raw linters is the basis of the claim here presented.

3. After the conference of June 14, 1918, Mr. Rumsey, petitioner's president, went to Wilmington and there entered into a contract with the Hercules Powder Co., under date of June 15, for 1,000 bales of bleached linters at \$12.25 per hundred pounds f. o. b. Oklahoma City. Immediately after this contract was entered into, and before there was any delivery, and at the special invitation of Mr. Rumsey, the Hercules Powder Co. sent an inspector to petitioner's plant to inspect and test the bleached linters which peti-

tioner had on hand and proposed to deliver under the contract. The bleached linters proved to be totally unfit for the purpose for which they were bought and they were rejected. Subsequent thereto and after considerable correspondence petitioner consented to the cancellation of the contract of June 15 and entered into a new agreement with the Hercules Powder Co., under date of July 6, 1918, by which petitioner undertook to manufacture or refine 1,000 bales of bleached linters to meet the specifications of the Hercules Powder Co. Petitioner did thereafter fulfill this order and received payment therefor in accordance with its terms.

DECISION.

1. From the view here taken of this case it is not necessary to enter upon a discussion as to the authority of Mr. James, in the circumstances described, to bind the Government of the United States under a contract coming within the purview of the act of March 2, 1919. Nor is it necessary to pass upon the question as to whether or not Mr. James did enter into the agreement as alleged by the petitioner. The gist of the petitioner's claim is that the 1,000 bales of bleached linters in question had been secured by it upon a basis of \$4.67 per 100 pounds for the raw material, and that this 1,000 bales of bleached linters was secured for the purpose of filling a contract with the Canadian Government, and that having supplied this 1,000 bales of bleached linters to the Hercules Powder Co. in pursuance of the agreement made with Mr. James, and having been compelled to pay \$6 per hundred pounds for 1,200 bales of raw linters with which to replace this 1,000 bales to be used in the Canadian contract, it is entitled to recover the difference between \$4.67 per hundred pounds and \$6 per hundred pounds on 1,200 bales.

2. Even if the statements made by Mr. James might be construed as an agreement upon the part of the Government to see that petitioner was reimbursed for the difference between \$4.67 per hundred pounds and \$6 per hundred pounds for 1,200 bales of raw linters, still petitioner would not be entitled to recover, because petitioner had no bleached linters which met either the old Army specifications or the new Army specifications of February 28, 1919, or the specifications of the Hercules Powder Co., as being suitable for nitration. This condition was frankly admitted by the petitioner in the correspondence which subsequently took place with the Hercules Powder Co., and the contract between the Hercules Powder Co. and the petitioner for the 1,000 bales of bleached linters which was alleged to have been purchased to fill the Canadian contract was canceled by mutual consent because petitioner had no bleached linters which could properly be delivered under the terms of the contract with

the Hercules Powder Co. Subsequent to this cancellation petitioner undertook, at its own urgent request, to manufacture or refine 1,000 bales of bleached linters to be delivered to the Hercules Powder Co. If there had been any liability resting upon the part of the Government by virtue of the sale to the Hercules Powder Co. of June 15 of the 1,000 bales of bleached linters, the Government would have been completely relieved of any such liability by virtue of the subsequent agreement of July 6 entered into by petitioner and the Hercules Powder Co. for an entirely different 1,000 bales of bleached linters, which can in no case be regarded as bleached linters which the petitioner had on hand for the purpose of fulfilling the Canadian contract.

3. For the reasons above stated, all relief asked for in this case must be denied.

DISPOSITION.

A copy of this finding of facts and decision will be transmitted to the Claims Board, Ordnance Department, for its information.

Col. Delafield and Mr. Hardin^c concurring.

Cases Nos. 746 and 747.

In re **CLAIM OF DONNER STEEL CO.**

- 1. ALLOCATION BY AMERICAN IRON & STEEL INSTITUTE.**—Where a manufacturing company was notified by the American Iron & Steel Institute that a quantity of shell steel was allocated to it, contract for which should be negotiated "with Army Ordnance in the usual manner," and claimant did not regard the notification as an order, there was no agreement within the meaning of the act of March 2, 1919.
- 2. CLAIM AND DECISION.**—Both claims arise under the act of March 2, 1919. Claim No. 746 is for \$92,438.07, the value of raw materials purchased under an alleged oral agreement that the Government would take claimant's capacity production of shell steel. Claim No. 747 is for \$181,374.03, the value of raw materials purchased on the faith of an allocation of 11,850 tons of shell steel by the American Iron & Steel Institute, on which, however, no contract was awarded. Relief denied on both claims, because the evidence failed to establish the alleged agreements.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. These cases arise under the act of March 2, 1919. A statement of claims, Form B, has been filed in each case under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for (claim 746) \$92,438.07, by reason of an agreement alleged to have been entered into between the claimant and the United States on or about the 15th day of July, 1918, and (claim 747) for \$181,374.03, by reason of an agreement alleged to have been entered into between the claimant and the United States on or about the 15th day of July, 1918.
2. The claimant states in its claim 746 that the War Industries Board agreed with the claimant, that in consideration of its purchasing sufficient raw materials, including ore, coke, coal, etc., for complete operation during the winter of 1918-19, the War Industries Board, acting in conjunction with the Ordnance Department, would arrange to have placed with the claimant an order or orders for sufficient tonnage of shell steel to consume the said raw materials purchased by the claimant, that the claimant was requested, advised, and

ordered by J. Leonard Replogle, director of steel supply of the War Industries Board, and Maj. W. M. MacCleary of the Ordnance Department, to devote its plant entirely to the manufacture of shell steel, and that claimant was urged to have on hand sufficient quantity of raw material prior to the cessation of lake traffic to last during the winter of 1918-19, and that the claimant placed orders for coal, coke, and materials necessary to keep its plant running through the winter of 1918-19. It claims a loss on said necessary materials purchased of \$92,438.07.

3. Claim 747 states the facts set forth in claim 746 and also that the claimant on November 6, 1918, received advices that an order for 11,850 tons of shell steel was given it; that its representative, H. S. Uphouse, was informed by Lieut. Keating in Washington on November 12, 1918, that the order was going through; that the claimant had obtained supplies of sufficient raw materials, including ore, coal, coke, ferromanganese, etc., to manufacture said 11,850 tons of steel on the terms set forth in the preceding paragraph; that on December 14, 1918, the claimant received notice from Lieut. Keating that the formal order for said steel would not be issued. It claims a loss on the materials purchased necessary for said alleged order of 11,850 tons of \$181,374.03.

4. Claimant amended its claim at the trial (p. 51)—

“So as to * * * claim for the capital invested by the company in this business which it had for the Government and which * * * has been nonproductive for a considerable length of time, under authority of Supply Circular 111 and the decision of the Board of Contract Adjustment in the case of Levi Mattress Co., No. 173, book 2, page 285.”

5. The two claims may be considered together. The questions are:

(1) Did the claimant purchase the materials as set forth in claim 746 on the faith of an agreement for capacity production through the winter of 1918-19?

(2) Did the claimant receive an order for 11,850 tons of steel and did it purchase materials necessary to fulfill said alleged order on the faith of an agreement for capacity production of steel during the winter of 1918-19?

6. The Donner Steel Co. during the years 1917-18 was engaged in the manufacture of steel at Buffalo, N. Y. It also has furnaces for the manufacture of pig iron and for reducing manganese ore at Tonawanda, N. Y. The corporation was organized on or about January 1, 1916. Because of its location the company has difficulty in obtaining supplies of raw materials, such as coal, coke, and ore, during the winter. The navigation on Lake Erie closes during the winter months. Deep snows in that region often make it difficult during

the winter to transport raw materials by rail. In the fall of the year 1917 the Donner Steel Co. was much in need of fuel and other raw materials. On September 28, 1917, the claimant wrote the Priorities Committee as follows:

"We will be obliged to suspend operations in our open-hearth department due to our inability to obtain sufficient gas coal from the Pittsburgh Coal Company at Pittsburgh, and the Rochester & Pittsburgh Coal Company of Buffalo; also slack from the Lake Erie Coal Company of Buffalo, with whom we have contracts, which will result in delaying shipments of shell steel, account War Department order G. A. 178.

"We hereby make application for the issue of priority certificate under the classification determined by you, which will be filled out upon receipt and returned in order that you may authorize the above companies to ship us sufficient coal to continue operation."

On October 6, 1917, the Priorities Committee replied as follows:

"Replying to your letter of September 28 (our file No. 108) with reference to your inability to obtain sufficient gas coal from the Pittsburgh Coal Company of Pittsburgh, Pa., and the Rochester and Pittsburgh Coal Company of Buffalo, and slack from the Lake Erie Coal Company of Buffalo, we beg to advise that the question of supply and distribution of coal is a problem primarily for the consideration of H. H. Garfield of this city, who has been appointed by the President as United States Fuel Administrator. We are forwarding your letter to him and if the difficulty continues would suggest that you communicate with him direct."

William H. Donner, president of the company, informed J. L. Replogle, director of steel supply of the War Industries Board, of the shortage. Mr. Replogle called on the Fuel Administrator and discussed claimant's shortage of coal and coke. On January 18, 1918, Mr. Replogle telegraphed the claimant as follows:

"Have secured exemption for your company from proclamation of Fuel Administration with understanding that one hundred per cent of your operations during mentioned period will be on Emergency Fleet orders and other urgent Government necessities."

The "mentioned period" in said telegram means the time during which the claimant continued on the preference list for fuel. (Testimony, p. 49.)

It is customary for steel manufacturers to order new materials from 6 to 12 months in advance of use (p. 41). The claimant, after it was placed on the preference list, ordered large quantities of coal and coke in the early months of the year 1918. In April, 1918, it received and stored 20,826 tons of coke and in May 7,548 tons and in June and July 8,424 tons. In September, 1918, it received and stored 7,429 tons of gas coal and in October 11,819 tons, and in November 4,555 tons.

On July 16, 1917, the claimant entered into a contract with Crocker Bros. in New York City for 600 tons of ferrosilicon at \$130 per ton. The contract provides:

"In case of strikes * * * or other occurrences beyond the control of the sellers the supplies of metal now contracted for may be suspended during their continuance."

An embargo was placed on the exports of said ferrosilicon from the Dominion of Canada in 1917. The claimant received the said 600 tons through the year 1918 (p. 138). It also ordered ferromanganese ore in the year 1917 and early in the year 1918 (p. 125), which it reduced in one of its furnaces at Tonawanda, N. Y., and sold to various parties. The claimant increased its production from time to time and during the month of November, 1918, produced approximately 10,000 tons of steel (p. 259).

7. William H. Donner made frequent calls during the year 1918 on Mr. Replogle, director of steel supply of the War Industries Board, and his assistant, Edwin E. Sawyer, and on Col. W. M. MacCleary of the raw materials section, Procurement Division of the Ordnance Corps, to ask for orders. He testified:

"I remember we were told that we would be given all the shell steel orders that we could roll for the next six months—this was in October. * * * Mr. Replogle told me that at one time and I think Mr. Sawyer made the same statement and Colonel MacCleary * * * in 1918." (P. 56.)

"They told me that they could give me orders for 30,000 to 50,000 tons of shell steel as soon as we were in a position to fill the orders, and that they would give us orders from time to time, at the price they could use shell steel shipped from Buffalo to best advantage. * * * We were in best position to ship shell steel to Canada and New England (p. 59). That they did not want to place them [orders] too far ahead." P. 78.)

Mr. Replogle and Col. MacCleary urged Mr. Donner to use his best efforts to increase the claimant's tonnage of projectile steel. Col. MacCleary urged Mr. Donner in August and September 1918 (p. 183), to get as much raw material ahead as he could so that he could keep the forging plants going. Maj. MacCleary testified (p. 227), "I told him we would use his capacity as long as the war lasted;" (p. 211) that that there was no agreement with the Donner Steel Co. that the Government would take all they produced and in whatever form they produced it. Mr. Replogle stated (p. 29) that in his talk with steel manufacturers he never emphasized the acquisition of materials as it was a continual fight to get even the amount needed for their current operations, that he thought the claimant did not catch up with its coal supply until near armistice time. Mr. Replogle (pp. 32, 40, and 42) and Col. MacCleary (pp. 214 and 215) both testified

that they made no agreement with the claimant which obligated it to supply itself with sufficient materials to keep its plant running during the winter of 1918-19. Mr. Sawyer testified (p. 177) that, although the War Industries Board was urging the claimant and other manufacturers to manufacture capacity production of steel it was understood that the manufacturers must make contracts from time to time with France, England, and the United States, and that the manufacturers knew they were taking the risk of the termination of the war in accepting such orders.

8. In November, 1918, the claimant had the following contracts with the United States Government which had not been completed:

P-13941-3421-A, dated August 21, 1918, for 18,912 tons shell steel billets.

P-14069-3436-A, dated August 23, 1918, for 18,823 tons shell steel billets.

P-14365-2387-ME, dated August 27, 1918, for 14,688 pounds boiler plates.

P-14413-2398-ME for 3,672 pounds boiler plates.

P-14918-5098 dated September 12, 1918, for 2,875 tons steel plates.

P-17942-170P-GI, for 500 tons pig iron.

The claimant also had in November, 1918, contracts with Great Britain and France for steel. It had a contract with France for 16,087 tons of steel which it never completed (p. 256).

9. During November, 1918, the claimant continued to do certain work on its contracts with France and also with Great Britain. It arranged with the United States to substitute billets or slabs for shell steel ordered, and continued its work under its contracts with the United States until January 15, 1919.

(P. 278:) The claimant endeavored to secure commercial business after the armistice, but failed to obtain many orders. (P. 284:) It made steel billets in the spring of 1919 and sold them at $2\frac{1}{2}$ cents per pound, although it had previously received $3\frac{1}{4}$ cents per pound from the Government. (P. 285:) The said business was conducted at a loss because the claimant could not operate at full capacity. (P. 73:) The claimant closed down its open-hearth furnaces and blast furnaces for five or six weeks after January 15, 1918.

When asked how long it would take the claimant to stop its Government business and get into production in commercial business, Mr. Replogle testified (p. 46:)

"I think the transition would be a very simple matter. I do not think it would be a serious matter at all. I would not think that it would take over thirty days to get to a commercial basis, because his products outside of projectile steel are to-day very similar to what they were."

10. The items of the claims are as follows:

Claim #746:

736 tons ferromanganese, @ \$146.86-----	\$108, 118. 33
512.96 tons ferrosilicon, @ \$111.45-----	57, 170. 10
1,528 tons coke on hand, @ \$10.288-----	15, 721. 43
15 910 tons coal on hand, @ \$4.625-----	73, 595. 24
300 tons ferrosilicon (Crocker Bros.), @ \$26.78-----	8, 046. 12
Cost of storing gas coal-----	12, 879. 31
Cost of storing coke-----	1, 353. 12
Interest on capital invested in coal and coke to June 1, 1919-----	3, 506. 39

Total-----	280, 390. 04
Less 736.02 tons ferromanganese, @ \$90-----	\$66, 258. 00
Less 512.96 tons ferrosilicon, @ \$85-----	43, 601. 60
Less 1,528 tons coke, @ \$6.16-----	9, 412. 08
Less 15,910 tons gas coal, @ \$4.31-----	68, 680. 29

Total deductions----- 187, 951. 97

Balance claimed under claim #746----- 92, 438. 07

Claim # 747:

131.08 tons ferromanganese, @ \$142.48-----	\$18, 778. 86
Saws, saw billets, air hose, and armature-----	9, 472. 66
14,968 tons of coke on hand, @ \$10.28-----	153, 995. 27
7,893 tons of gas coal on hand, @ \$4.62-----	36, 510. 65
57.06 tons of ferro-silicon, @ \$26.78-----	1, 542. 87
Storing coke-----	13, 175. 92
Storing gas coal-----	6, 393. 33
Equipment of commissary-----	3, 090. 94
Interest on capital invested-----	11, 545. 33
Loss incurred on account of shutdown of plant-----	68, 432. 75
Moving crane-----	49. 03

Total-----	322, 987. 61
Less deduction for 131 tons ferromanganese, @ \$90-----	\$11, 682. 00
Less allowance on hot saws, air hose, armature-----	3, 500. 00
Less 14,968 tons of coke, @ \$6.16-----	92, 199. 08
Less 7,893 tons of gas coal, @ \$4.32-----	34, 072. 50

Total deductions----- 141, 613. 58

Leaving a balance claimed under claim # 747 of----- 181, 374. 03

11. In claim 747 the claimant states that on November 6, 1918, it received advices that it had been given an order for 11,850 tons of shell steel. The American Iron & Steel Institute sent the claimant a letter dated November 6, 1918, which reads as follows:

"The Sub-Committee on Steel Distribution apportion the Donner Steel Company the following shell steel tonnage:

Net tons.	Description.	Forging maker.	Delivery.
11, 850	6 $\frac{1}{4}$ " diagonal Gothic or R. C. sq. for U. S. 155 m/m.	Fairfax Forgings (Ltd.), Montreal, Que., Canada.	4,345 tons each, February & Mar., 3,160 tons April.

"You will note that the above tonnage is merely a continuation of steel supply for Fairfax Forgings (Ltd.), 19,750 tons of which is already on your books under item #117 for delivery September to

January. Delivery of this additional 11,850 tons beginning February is not to be taken literally, since we understand same is to commence upon completion of your item #117 and then continue at the rate indicated.

"The War Industries Board has been advised of this *allocation*, and we understand you *will complete your negotiations with Army Ordnance* in the usual manner."

Harry G. Uphouse, sales manager of the claimant, testified that he called on Lieut. Keating, of the Ordnance Corps, on November 12, 1918, mentioned the allocation of November 6, 1918, and asked if claimant would secure the order, and that Lieut. Keating said (p. 97) :

"That, although the armistice was signed, he had no word, in so far as their department was concerned, that war was over, and they would issue that order in the usual manner unless there was some information to the contrary; could expect our order in a few days."

In November, 1918, the Ordnance Department was not issuing procurement orders to contractors, but in proper cases issued copies of requisitions for contracts (p. 234). On November 3, 1918, Mr. Replogle wrote Col. MacCleary as follows:

"Reference your letter date November 1st. File—Army No. C-2008, Raw Materials #219, Proc. Ord., requesting allocation of 11,850 tons of shell steel for U. S. 155 m/m to be shipped to Fairfax Forgings (Ltd.), Montreal, Quebec.

"Allocation made to Donner Steel Company for delivery, 4,345 tons each, Feb. and March, 3,160 tons April."

On November 25, 1918, Col. MacCleary wrote J. L. Replogle as follows:

"1. Reference is made to shell distribution item No. 266 and your letter of November 7th allocating 11,850 tons of shell steel to the Donner Steel Company for delivery to the Fairfax Forgings Company (Ltd.), Montreal, on allocation No. Ord. 1124.

"2. It is requested by this department that you cancel this allocation, as this department has been instructed not to procure steel for these forgings."

On December 10, 1918, H. G. Uphouse wrote Col. MacCleary as follows:

"We were advised by the subcommittee on steel distribution, American Iron & Steel Institute, under date of November 6th, that there has been allocated to us 11,850 net tons of 6 $\frac{7}{8}$ " diagonal gothic or R. C. squares for U. S. 155 m/m shells for shipment to Fairfax Forgings (Ltd.), Montreal, Canada, 4,345 tons each, to be delivered during February and March, and 3,160 tons in April.

"When the writer was in Washington on Nov. 13th. Lieut. Huntley stated he had the requisition and would forward it to us that week. In order to clear our records, will you please advise whether you have sent the order to Buffalo to cover this transaction."

On December 12, 1918, Lieut. E. F. Keating replied as follows:

"I am directed by the Chief of Ordnance to acknowledge and reply to your letter of December 10th with reference to 11,850 tons of standard gothic billets for the manufacture of 155 m/m shell-body forgings which this department intended to place with you for shipment to the Fairfax Forgings (Ltd.).

"This information was given you subject to the approval of the Board of Review of the Procurement Division. At the time you were in Washington it was fully expected that this order would be placed. The Board of Review have disapproved this purchase, consequently contract will not issue."

J. L. Replogle, of the War Industries Board, testified (p. 7):

"We made no contracts with the manufacturers. Contracts were made direct with the governmental departments."

The American Iron & Steel Institute acted entirely in an advisory capacity. It had no governmental authority (p. 9). Mr. Replogle testified (p. 12) the allocation of the American Wire & Steel Institute directed to the claimant "was only a suggestion, because the steel trade generally knew that they acted only in an advisory capacity;" that the said allocation gave the claimant notice that it must negotiate with Ordnance for an order if it expected to get it.

DECISION.

1. In September, 1917, claimant found it impossible to obtain a sufficient supply of coal to operate its plant. This was due in part to the difficulty of transporting coal to Buffalo during the winter season and in part to the war emergency which compelled the Government to give certain manufacturers priorities in obtaining supplies of fuel. The claimant then approached the Priorities Board and was referred by it to the Fuel Administrator. Later Mr. Donner explained the situation to Mr. Replogle, who telegraphed Mr. Donner in January, 1918, that the claimant had been placed on the preference list by the Fuel Administrator, with the understanding that its entire product should be sold to the Government. Early in 1918 the claimant placed large orders for coal and coke. It had ordered large quantities of ferromanganese ore in 1917, which it imported from distant points. It was prudent for the claimant to order large supplies of raw material in advance, because (1) it was the usual custom of careful manufacturers in the steel trade, (2) its geographical position made it difficult to obtain such supplies in winter, (3) during the emergency it was difficult for the steel manufacturers to obtain sufficient supplies, (4) it anticipated large orders from the United States, France, and Great Britain.

2. The claimant continued operations under its contracts with the United States Government until January 15, 1919. Its unfulfilled contract with France for 16,087 tons of steel was sufficient work to continue its operations until March 5, 1919, which was through the winter of 1919.

The claimant's inability to get back to a paying commercial basis, in spite of more than two months of activity on orders of the United States after the armistice, is to be regretted. Mr. Replogle, an experienced steel manufacturer, is of the opinion (p. 46) that its transition to a commercial basis should not have taken more than 30 days.

3. Mr. Donner's statement that Col. MacCleary said in October, 1918, claimant would be given all the steel orders it could roll during the winter of 1918-19, and that the orders would be given from time to time as demands from the Buffalo region arose, is not in accord with Col. MacCleary's testimony (p. 227), "I told him we would use his capacity as long as the war lasted"; (p. 211) "there was no agreement with the Donner Steel Co. that the Government would take all they produced and in whatever form they produced it"; and (p. 215) that he made no agreement with the claimant which obligated it to supply itself with raw materials to keep its plant running in full capacity during the winter 1918-19. Further, both Mr. Replogle (p. 42) and Mr. Sawyer (p. 135) denied that they made any agreement with the claimant which obligated it to supply itself with sufficient materials to keep its plant running during the winter 1918-19.

4. The letter of the American Iron and Steel Institute, dated November 6, 1918, to the claimant advising it that an additional 11,850 tons of steel had been allocated to it, expressly states:

"You will complete your negotiations with Army Ordnance in the usual manner."

The said letter was not an order. The American Iron and Steel Institute acted entirely in an advisory capacity. In this case it had no governmental authority to place an order. The claimant did not regard it as an order, for its sales manager, Harry G. Uphouse, inquired of Lieut. Keating, of the Ordnance Corps, on November 12, 1918, whether the claimant would secure an order. Mr. Uphouse's letter of December 10, 1918, to Col. MacCleary states that the claimant had not received the order and Lieut. Keating's reply on December 12, 1918, states:

"The Board of Review has disapproved this purchase, consequently contract will not issue."

5. We find from the testimony and correspondence that no agreement was made between the claimant and a representative of the

United States or of the President for the capacity production of the claimant's plant during the winter of 1918-19 nor for any production other than such as was covered by specific orders or contracts.

6. We find that no agreement was made between the claimant and a representative of the Secretary of War or the President for the manufacture of the 11,850 tons of steel mentioned in the letter to the claimant from the American Iron and Steel Institute, dated November 6, 1918.

7. Claims 746 and 747 are denied.

Col. Delafield, Mr. Hunt, and Mr. Shirk concurring.

Case No. 2374.

In re CLAIM OF ATLAS CABINET CO.

1. **FORMAL CONTRACT—TERMINATION—JURISDICTION OF SECRETARY OF WAR.**—Where a written contract has not been terminated by performance or by breach, the Secretary of War has jurisdiction to enter into a supplemental settlement contract adjusting all questions arising under such contract.
2. **NONDELIVERY—CANCELLATION.**—Where such contract, as amended, gave claimant 40 days from date of contract to commence deliveries, such contract could not be canceled for nondelivery before the expiration of such time.
3. **CLAIM AND DECISION.**—This is an appeal from the Air Service Claims Board disallowing claim for \$12,854.79 growing out of a formally executed contract. The claim was disallowed by said board upon the theory that it had been canceled for nonperformance and that the Secretary of War had no jurisdiction to adjust same. Held, the contract not having been canceled, the Secretary of War has authority to adjust same by supplemental contract.

Mr. Huidekoper writing the opinion of the Board:

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board, Air Service, on a claim for \$12,854.79 on a formally executed contract, under the following circumstances:

2. On September 26, 1918, Capt. O. R. Ewing, A. S. A. P., of the Bureau of Aircraft Production, wrote to the claimant as follows:

“Confirming telegraphic instructions and in accordance with your quotations of Sept. 24, 1918.

“I am directed by the Director of the Bureau of Aircraft Production to place order with you for the articles listed below:

* * * * *

“Marked: Order No. 750069 ‘Aero.’

Item:

1a 10,000 rotating map cases in accordance with model in your possession, @ \$5.50 ea.....	\$55,000.00
2a 750 extra fittings for above cases, @ \$.90 ea.....	675.00
Total.....	55,675.00

“NOTE.—Delivery of above will commence in about 30 days, will be completed in 14 weeks.

* * * * *

“Contract No. 4836 will follow.”

3. Contract No. 4836, dated October 1, 1918, was duly signed by the contracting officer and by the claimant and was approved October 29, 1918. The material provisions of this contract are as follows:

"ART. 1. That the said contractor shall furnish to the Government the material described in order No. 750069, copy herewith, which, together with all authorized amendments thereto, is hereby made a part of this contract.

"ART. II. That the deliveries of the supplies and materials herein contracted for shall be made in the manner, numbers, or quantities specified in the order.

* * * * *

"ART. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the Government may elect one of the following courses: (a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the Government of having the articles or equipment completed; (d) or may permit the said contractor to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as and if provided in the attached order."

4. On October 8, the claimant wrote the Procurement Division, Bureau of Aircraft Production, as follows:

"We desire to say that we are having a little bit more delay arranging details with reference to new plant than we anticipated, and if agreeable with you we will be pleased to have you give us a little more time than the original order contemplated. A change to forty days from date of contract as to the beginning of deliveries and to be completed twelve weeks thereafter will be much appreciated.

"Kindly wire us at our expense, covering this letter and especially that part of it as to the rider on the contract."

The following reply, dated October 15, was sent claimant by the officer who signed the contract:

"3. In accordance with your request for additional time in which to complete this order, deliveries thereunder are amended to read as follows:

"Delivery of above will commence in forty days and will be completed within twelve weeks thereafter."

5. On November 8, the Bureau of Aircraft Production sent claimant a telegram, as follows:

"Order seven five naught naught six nine, ten thousand map cases, is canceled because of no deliveries to date and material no longer needed. Letter follows."

On November 9 the following letter was sent to claimant by Capt. Ewing, "By direction of the Acting Director of Aircraft Production":

"1. Reference is made to order # 750069 placed with your company September 26, 1918, for 10,000 rotating map cases and 750 fittings, at a total consideration of \$55,675.00.

"2. In view of the fact that no deliveries have been made by you under this order, although overdue, this order is hereby canceled, and contract number 4368 is hereby rescinded in accordance with the provisions of article five thereof.

"3. This confirms telegraphic instructions of even date.

"4. Kindly acknowledge receipt of this letter of cancellation."

6. The claimant did not acquiesce in this attempted cancellation of its contract, but had its representative call on bureau officials in Washington on November 11, and advised them that the claimant had about 100 cases and 350 bracket fittings and pieces and also parts for the entire order stamped out, finished, and ready for quick delivery. The Government, however, relied on its notice of cancellation and has not made any settlement with the claimant.

7. An audit and accounting has been made by the Bureau of Aircraft Production of the claim as presented to it for \$11,017.85 (but which has subsequently been amended to \$12,854.79). The audit report contains the following recommendation:

"The amount of the claim, \$11,017.85, is considered very reasonable and the incorporation of this amount in a supplementary contract is recommended, provided the cancellation effected by telegram of November 8, 1918, and letter of November 9, 1918, for failure to deliver, are rescinded and replaced by the usual or regular suspension requested, and provided further that the purchase or receipt of about \$4,030.10 in value of raw materials after the date of cancellation is approved."

8. The minutes of the Claims Board, Air Service, of December 10, 1919, contain an extract relating to the Atlas Cabinet Co., as follows:

"It appears that the case has never been before this Board because of the fact that the contractor was advised by the contracting officer on November 8, 1918, that the order was cancelled by reason of default. The following action was taken by the board in this matter: Whereas it appears that this order and contract was cancelled by telegram dated November 8, 1918, for default in that the contractor had failed to make deliveries within the terms of his contract that the claimant be advised that the board cannot legally entertain a claim under the contract and he be further advised of his right of appeal to the Board of Contract Adjustment under the provisions of Supply Circular #46."

9. The claimant has assigned the following reasons for its appeal to the Board of Contract Adjustment:

"1. The Air Service Claims Board could legally entertain a claim under this contract, as the contract was not properly cancelled by

telegram dated November 8, 1918, and that there was no default by the Atlas Cabinet Company, as it had not failed to make delivery within the terms of the contract, having under said contract a period of two days to begin the making of delivery from the purported date of cancellation, for the following reasons:

(a) An extension of forty days from date of contract (October 1, 1918) was granted to begin deliveries, the contract to be completed twelve weeks thereafter.

(b) The date of cancellation was November 8, 1918, two days premature.

(c) The contract was not canceled because "*no deliveries to date and material no longer needed*", as the telegram was *in truth* based upon armistice news in the hands of the Government at the time and prompted the wire *material no longer needed*."

DECISION.

1. The question presented is the legal effect of the attempted cancellation of the claimant's contract. If the contract has been rescinded, the Secretary of War has no power to amend it, but if the attempted cancellation was inoperative, the Secretary of War may now enter into a supplemental contract to adjust the losses claimant has suffered. (*Burton v. U. S.*, 15 Compt. Dec., 439.)

2. The power of the Government to rescind the contract in question without the consent of the contractor is limited, by the termination clause in the contract, to the failure of the contractor to perform the contract within the time and in the manner specified in the contract. The alleged default of the contractor, which was relied on by the Bureau of Aircraft Production, was because the contractor had not made any deliveries prior to November 8, when the telegram was sent. If it be a fact that the claimant was not obligated to make deliveries prior to November 8, then it would not be in default, and the Government's attempt to rescind the contract, on that ground, was inoperative and of no effect.

3. The order of September 26 provided that delivery will commence in *about* 30 days and will be completed in 14 weeks. It also provided "Contract No. 4836 will follow." When the contract, dated October 1, was sent to claimant for signature, and before the claimant signed it, he wrote to the Bureau of Aircraft Production on October 8 and requested "A change to forty days *from date of contract* as to the beginning of deliveries." This request was promptly acceded to by the Bureau of Aircraft Production, which wrote claimant on October 15 as follows:

"3. In accordance with your request for additional time in which to complete this order, deliveries are amended to read as follows:

"Delivery of above will commence in forty days and will be completed within twelve weeks thereafter."

With this amendment agreed upon, claimant signed the contract, which was approved on October 29.

The claimant's letter of October 8 and the Government's reply must be read together to determine when the 40 days were to begin to run. The Bureau of Aircraft Production contended that it was from the date of the original order of September 26, whereas the claimant contends it is from the date of the formal contract, which is dated October 1. Manifestly, the claimant is right, because its request was for "40 days *from date of contract*," which request was granted "in accordance with your [claimant's] request for additional time." The answer, referring, as it does, to claimant's letter, must be read in that connection, and, by all reasonable intendment, grants 40 days for beginning of deliveries from the date of the contract, which was October 1. This is the only construction that can properly be put on the two letters when they are read together. It follows that the claimant's contract did not require it to make deliveries on November 8, when the Bureau of Aircraft Production telegraphed that the order for map cases was canceled "because of no deliveries to date and material no longer needed; letter follows." The letter of November 9 which followed was in confirmation of the telegram and has no greater value than the telegram has, because its date shows that the day of November 9 had not passed when it was sent, and the claimant was not then in default, even by the strictest rule of construction.

4. As the termination clause in the contract restricted the Government's right to rescind the contract to a default by the contractor, and as the contractor was not in default when the Government sought to rescind the contract, we must hold that the attempt to cancel the order of September 26 and rescind contract No. 4836, as contained in the telegram of November 8 and the letter of November 9 from the Bureau of Aircraft Production, was inoperative and void and of no effect.

5. The Secretary of War is free to enter into a supplementary contract with the claimant so as to reimburse it for the losses sustained by reason of the suspension of the contract.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for appropriate action.

Col. Delafield and Mr. Eaton concurring.

Case No. 2033.

In re CLAIM OF WESTINGHOUSE ELECTRIC & MANUFACTURING CO.

1. **ORAL AGREEMENT.**—Where an authorized officer gave claimant's representative an oral order for certain repair parts and claimant delivered the parts in compliance with the order, there was an agreement within the terms of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral order for repair parts for a turbine engine and condenser. Held, claimant is entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$4,593.24, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In August, 1918, M. A. Guerin, captain, Engineers, United States Army, was ordered to Pottstown, Pa., to dismantle, crate, and ship to France a turbine engine.

3. In removing this plant it was discovered that certain auxiliary parts were broken and that spare parts would be needed to set this plant up upon its arrival in France.

4. Capt. Guerin was instructed verbally by his chief, Maj. Charles Hodge, Engineer Corps, United States Army, assigned to duty in the Engineering and Purchasing Division of the General Engineer Depot, Washington, D. C., to purchase such repair parts and extra parts as might be required to set up the turbines and condensers upon their arrival in France. (Affidavits of Maj. Hodge and Capt. Guerin.)

5. In accordance with these instructions, Capt. Guerin placed a verbal order with claimant company for the materials and spare parts set forth in the claim herein.

6. These materials were manufactured, packed, and shipped in accordance with Capt. Guerin's orders to Henderson Bros., Philadelphia, Pa., for reshipment to France. The armistice was signed and the goods were left with Henderson Bros. and finally returned to claimant.

DECISION.

1. An informal contract was entered into between Capt. M. A. Guerin, Engineer Corps, United States Army, and claimant for the goods set forth in the claim attached herein, and claimant is entitled to recover.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Lieut. Col. Carruth concurring.

CASES Nos. 645, 1873.

In re CLAIM OF LEOPOLD MORSE CO.

1. **NO EXPENDITURES ON FAITH OF CONTRACT.**—Where payment is sought by claimant for expenditures, all of which were made several months before the making of alleged informal contracts with the Government, the expenditures were not made upon the faith of said alleged contracts, and it is immaterial to ascertain whether or not said contracts were entered into as alleged.
2. **CLAIM AND DECISION.**—Claim in each case under act of March 2, 1919. The two claims, one for materials for wool coats and the other for materials for wool trousers, were tried as one case. Held, that claimant is not entitled to relief on either claim.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. These cases arise under the act of March 2, 1919. Statements of claim, Form B, have been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$14,635.47 in case No. 645, and \$16,749.77 in case No. 1873, by reason of agreements alleged to have been entered into between the claimant and the United States.
2. Both of the above cases were heard at the same time, and the evidence which claimant contends supports its alleged claims is so closely interwoven that it is impossible to separate it and apply it to each individual case. Therefore, the cases are decided as one case.
3. Claim No. 645 is based upon an alleged contract for the manufacture of wool service coats, and claim No. 1873 is based upon an alleged contract for the manufacture of wool service trousers. In each case claim is made for additional machinery and for trimmings and materials procured for the purpose of complying with the alleged agreements.
4. In the latter part of October or the 1st of November, 1918, claimant alleges that its vice president, Mr. Julius C. Morse, had a conversation with Mr. Carl Dreyfus, of the Quartermaster Department, New York City, relative to the manufacture of 35,000 pairs of trousers, and in that conversation Mr. Dreyfus stated that a

contract had been awarded claimant company for 35,000 pairs of trousers at 75 cents per pair, and that a contract would be sent them within a few days. (Affidavit of Julius C. Morse, claimant's "Exhibit No. 5.")

5. At the same time, to wit, in the latter part of October or on or about November 1, Mr. Leon Strauss, treasurer of claimant company, claims to have had a conversation with Mr. Dreyfus, wherein Mr. Dreyfus stated that the claimant company could have a contract for 30,000 wool service coats at \$1.69 per coat, and that this would be confirmed by a written contract within a few days.

6. In the hearing, Mr. George L. O'Brien, manager of claimant company, testified that the contract for wool service coats was made with him by Mr. G. S. Talbot, at that time assistant to Mr. H. L. Wells, who was in charge of production of the uniform section, Quartermaster General's office, New York City.

"Mr. O'BRIEN. 1918. I saw the contract we were then working on was nearing completion; so, as had been the custom, I went to New York and to the Quartermaster Depot at 16th Street, talked with Lieut. Desmond, and he introduced me to Mr. Talbot of the Contract Branch of the Government. I told Mr. Talbot that we needed another contract, that we had finished the one we had, and, while I was there, he looked up the report of the concern to see what it was and came back and said the report was all right, and gave us a contract for 30,000 coats.

"Q. What did he say?

"Mr. O'BRIEN. He said that our standing was all right and that we could have enough work for one month. 30,000 coats was the amount for that month.

"Q. Did he give you an order for those coats there and then?

"Mr. O'BRIEN. He did not give me any written order; no, sir.

"Q. No; but did he give you any verbal order?

"Mr. O'BRIEN. Yes. I told him that we were constantly urged to increase production, and that I was going to go ahead and prepare, as I did. I changed over the factory so as to be able to turn out more goods.

"Q. Well, did he at the time give you the order for those coats?

"Mr. O'BRIEN. Yes, sir.

"Q. What did he say?

"Mr. O'BRIEN. Well, he gave me the order for 30,000 coats and said that I would receive a written contract in about a week's time." (Tr., pp. 7, 8, 9.)

7. On November 5, Mr. Leon Strauss wrote the Quartermaster General, quartermaster depot, New York City, as follows:

"As per our conversation when I was in New York a few days ago I would like to remind you that we have not yet received the contract for wool service coats which we were given to understand was under way.

"We are speeding up production and securing additional equipments, training help constantly, so that there will be no hold up on

our part in the delivery of these coats, as we realize the need of prompt deliveries.

"We must have this new contract very quickly so as to get materials, etc., routed before we approach the end of our present assignment, otherwise our organization will dissolve, and under present labor conditions this would be fatal to the desired production."

The Quartermaster General replied to this letter in the following terms:

"1. Reference is made to your letter of November 5.

"2. In discussing the matter of further contract for wool coats with Mr. Wells this afternoon, you are informed that a 'continuing' order will be sent to you in a few days."

8. It is upon these three conversations and correspondence that claimant alleges that it expended large sums of money, the basis of these claims, for additional machinery and materials to comply with the two contracts mentioned.

9. In regard to the conversation with Mr. O'Brien as to the placing of the contract for 30,000 wool service coats, Mr. Talbot testified as follows:

"Q. If Mr. O'Brien or Mr. Morse or anybody else had come into you and asked for a further contract, you would have looked up his record?

"Mr. TALBOT. That is the first thing I would have looked up.

"Q. So you would have known just how far he was along with his formal contracts?

"Mr. TALBOT. Yes.

"Q. So that if at that time he had not completed his original contract and had some 14,000 or 15,000 coats yet to complete, you would not have given him a contract?

"Mr. TALBOT. No, sir; I would not." (Tr., p. 90.)

10 Mr. Dreyfus testified as follows:

"1st. As supervisor of purchase methods, my work was to unify the methods of purchase in the Department, and by simplifying the methods, expedite the purchase and manufacture of goods. In addition I 'sat in' at the meeting of the board of awards, and if there was not a full attendance of the regular board, I acted as a member of the board of awards, and therefore was somewhat familiar with the awards in the manufacturing branch of the C. and E. Division.

"2nd. I was not authorized to enter into contractual relations on behalf of the Government with any one.

"3rd. Mr. Morse called at the Government office to get information regarding a contract for trousers, of which the Army was much in need at that time, and while waiting for Mr. Wells, who at that time was in charge of that particular department, asked whether a contract had been awarded to the Leopold Morse Company. Upon investigation I found that a contract had been recommended to them, and had Mr. Wells substantiate this, which information I immediately gave to Mr. Morse.

"4th. While it was not my intention to instruct the Leopold Morse Company to proceed with the manufacture of the trousers

in question, I recall telling Mr. Morse that the contract would be sent him in the regular course.

"It was quite generally understood, I believe, that manufacturers were proceeding on orders prior to the receipt of a procurement order or contract." (Government Exhibit No. 1.)

11. Mr. H. L. Wells, who was acting chief of the uniform section of the Quartermaster Department, New York City, between the period of October 28 and November 6, testified that he had told Mr. Dreyfus that the Leopold Morse Co. had been recommended for an award for the manufacture of trousers, and in that connection he also testified as to the custom and practice of the Quartermaster General's Office at that time.

"Q. What distinction, if any, was there in your custom between recommending for an award and the actual granting of an award?"

"Mr. WELLS. Well, the distinction was simply this: There were four checks on a recommendation after we had made it; that is, it was subject to the Bureau of Labor standards; it was subject to the credit and finance section—that is, to their approval or disapproval; it was subject to the approval or disapproval of the board of awards, and then reviewed in Washington by the Board of Reviews, and then finally delivered by the local zone supply officer to the contractor.

"Q. No award was made, then, Mr. Wells, until after it had finally passed the Board of Review?"

"Mr. WELLS. There was really no award made until it had been signed by the local zone supply officer.

"Q. But, then, you could not do that until after it had passed the Board of Review?"

"Mr. WELLS. No, sir.

"Q. So on this particular occasion what you told Mr. Dreyfus was, as I understand it, that the Leopold Morse Company had been recommended for an award?"

"Mr. WELLS. That is correct." (Tr. pp. 72, 73.)

12. No work was ever started or done upon either of the alleged oral agreements upon which claimant files its several claims.

13. All of the materials set forth in these claims were purchased from two to six and nine months previous to the alleged conversations.

"Q. When were the materials used in that contract purchased?"

"A. Which one are you talking about now?"

"Q. The coat contract.

"Mr. O'BRIEN. They were purchased from two to three to six and perhaps nine months previous.

"Q. Previous to what?"

"Mr. O'BRIEN. The receipt of the oral order." (Tr. pp. 18, 19.)

See also bills filed for materials delivered to claimant company.

14. At the time the alleged verbal contracts were entered into claimant company was engaged upon the performance of two formal contracts with the United States Government; one for the manufacture of 30,000 wool service coats, the other for the manufacture of

36,000 wool service trousers, and on November 15, 1918, they had completed 26,000 trousers on this formal contract, and 14,000 or 15,000 coats on the coat contract.

"Q. How far completed were they when you received this notice, dated November 15, 1918, to cease operation on all contracts? How much was finished?

"Mr. O'BRIEN. On the trousers we had 26,000 finished and on the coats between 14,000 and 15,000.

"Q. Then, from the 28th of October, or November 1, 1918, which are the dates, according to the testimony introduced, at which these alleged verbal contracts were made; between that time and November 15 was or was not your force in your two factories at work on these uncompleted formal contracts?

"Mr. O'BRIEN. They were.

"Q. Then, when in your bill you charge for wages, one month's salary of factory superintendent, foremen, assistants, and office department, \$1,400, what month is that supposed to cover?

"Mr. O'BRIEN. The month of December that we were supposed to make that contract in." (Tr., p. 53.)

15. The formal contracts were suspended on November 15 by the Quartermaster General's Office, through the zone supply officer at Boston, Mass.

"1. The following telegram dated November 14th has been received by the zone supply officer:

"Operations under all contracts except for food and forage on which no work has yet been done should be suspended and held up for final adjustment."

"2. The zone supply officer is endeavoring to get in touch with every contractor to whom this telegram applies, and in case any contractor has not been notified by phone or telegram and is in doubt as to whether the telegram applies to one of his contracts he should immediately get in touch with the zone supply officer." (Claimant's Exhibit No. 3.)

16. At the time of the alleged conversation between Mr. Talbot and Mr. O'Brien in New York City, contractor was delinquent in its deliveries on the formal contracts.

17. The machinery for which claimant asks remuneration was all purchased prior to the entry into the formal contracts. (Testimony of Mr. Geo. L. O'Brien, Tr., p. 37, and affidavit of Mr. Julius C. Morse.)

DECISION.

1. Whether claimant entered into a contract with the United States Government as alleged or not, is immaterial, as it is the opinion of this Board that no expenditures for materials, labor, or machinery were made upon the *faith* of these agreements alleged to have been made in the latter part of October or the 1st of November.

2. All obligations for which remuneration is here asked were incurred months previous to the date specified—i. e., between October 28 and November 1—when these alleged contracts were supposed to have been entered into between the claimant and the United States Government.

3. For the foregoing reasons claimant's petition in both case No. 645 and case No. 1873 is denied.

DISPOSITION.

1. A final order denying relief will issue.
Col. Delafield and Mr. Huidekoper concurring.

Case No. 1198.

In re CLAIM OF INTERNATIONAL SILVER CO.

1. **CLAIM AND DECISION.**—Claim for \$1,237.62 on an alleged order for canteens. Held, there was no agreement within the meaning of the act of March 2, 1919.

Lieut. Col. McKeeby writing the opinion of the Board:

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$1,237.62, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On October 23, 1918, the General Supplies Division, Purchase, Storage and Traffic, recommended to the Contract Division that a contract be entered into with the claimant, International Silver Co., for the manufacture and delivery to the Government of 500,000 canteens, model 1910.

3. On November 5, 1918, Lieut. E. A. Marshall, Quartermaster Corps, notified claimant that it had been recommended for a contract for 500,000 canteens, model 1910, but stated that contract had not been issued.

4. Within a week of the signing of the armistice, Lieut. E. Carlisle Hunter, of the General Supplies Division, Purchase, Storage and Traffic, was notified by Mr. T. B. Lasher, representing the International Silver Co., claimant herein, that no expense had been incurred by the International Silver Co. toward the fulfilling of the contract recommended. (Tr., p. 13.)

DECISION.

1. Claimant has failed to establish that it entered into an agreement coming within the provisions of the act of March 2, 1919, either express or implied, with any officer or agent acting under the authority, direction, or instruction of the Secretary of War.

2. For the foregoing reason, the relief asked for in the petition of claimant herein must be denied.

DISPOSITION.

1. That a final order denying relief be issued.

Col. Delafield, Mr. Eaton, and Mr. Henry concurring.

Case No. 1604.

In re CLAIM OF SWEET & CONRAD CANNING CO.

1. **DISCHARGE BY MUTUAL AGREEMENT.**—Where claimant was holding a certain percentage of its output of certain articles, under request of the United States Food Administration, pending negotiations for the purchase of the same, for the use of the Army, Navy, and Marine Corps, and at the request of claimant said articles were released and claimant was given permission to dispose of the same, the contract, if any was made, was thereby terminated and discharged.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, in Form B, for losses alleged to have been incurred by reason of holding a portion of its pack of tomatoes at the request of the United States Food Administration. Held, that claimant is not entitled to relief.

Mr. Harding writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$638.18, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On September 27, 1918, the United States Food Administration issued Canned Food Bulletin No. 12, informing the canning industry of the country that the Army, Navy, and Marine Corps would need 45 per cent of the total pack of the 1918 season, and requesting that such proportion be held for Government purposes. This information came to the claimants, who were small canners in Marshfield, Mo. It does not appear how the information reached them, but, acting on this information, on October 15, 1918, they wrote the Food Administration, stating that they had about 600 cases of tomatoes, asking if the Government wanted 45 per cent of this quantity, that it would be inconvenient to ship so small a quantity, and wished to be advised at once of the Food Administration's desires.

2. On October 18, 1918, the Food Administration answered, asking that claimant's entire pack be sold to the Government on the

basis of the 45 per cent. quota, and suggesting that the tomatoes be pooled and shipped with those of the Good Hope Canning Co. in one carload, if agreeable to both parties. Claimants acknowledged receipt of the above letter on October 22, 1918, stating that they were still canning, would have 700 cases by the end of that week, and that their entire pack would be a little more than 700 cases, and agreeing to the Government taking the whole pack and to ship with the Good Hope Co., stating that they had been offered \$2 a dozen for the tomatoes. They also asked information about packing and shipping, stating that it was getting late, there was danger of the tomatoes freezing, and requesting answer by return mail.

3. The Food Administration answered the above letter on October 28, 1918, stating that the arrangement for packing and shipment was satisfactory and stating that the Government advanced \$1.50 on tomatoes; that the Federal Trade Commission would fix the price of tomatoes, and the balance due, over and above the \$1.50 advanced, would be paid claimants; the price to cover cost, plus reasonable profit, giving the requirements for boxing the tomatoes, and requesting that 6 cans, as samples, be sent the depot quartermaster at St. Louis. On October 30, 1918, before receiving the above letter, claimants wrote Mr. M. B. Munford, of Columbia, Mo., the food administrator of the State of Missouri, stating the quantity of tomatoes they had on hand, that 45 per cent of that amount would not make a carload, that it would be inconvenient to ship such a small quantity, and asked to be released from the requirement to hold 45 per cent; that there was danger of freezing and they wished to dispose of the tomatoes before they were exposed to freezing, and hoping that Mr. Munford would get them released.

4. The above letter was forwarded by Mr. Munford, food administrator of Missouri, to the Food Administrator at Washington on November 1, 1918, and marked received November 5. On November 13, 1918, evidently in response to the above letter, the Food Administration at Washington wrote claimants releasing them from holding the tomatoes, as requested in their letter to Mr. Munford, and suggesting that they be sold through other sources. On November 15, 1918, claimants, before receiving the above-named letter, wrote direct to the Food Administration at Washington, asking that board to release them from holding the 45 per cent quota of tomatoes and requesting an immediate reply by wire. To this letter the Food Administration on November 18, 1918, wired the following reply:

"Answering yours fifteenth tomatoes. We release you. This wire your authority—dispose of them."

On November 19, 1918, the claimants' letter was replied to by letter from the Food Administration confirming the telegram of the previous day, releasing the claimants from holding the tomatoes for the Government.

5. The claimants now present a bill for \$631.18, made up of three different items: One for \$551.60, the difference between \$2 a dozen, the amount for which they claim they could have sold the tomatoes in the fall of 1918, and \$1.60 the amount they did sell them for in May, 1919; another for \$46.41 interest paid on account of having to hold the tomatoes; and the third for \$40.17, storage the claimants say they had to pay on the tomatoes from November until May, the period for which they were held awaiting sale. Claim is made that the Government directed that the entire output of the tomatoes be held for it, and that by reason of the claimants having to hold the tomatoes for the Government, they lost 40 cents per dozen on the tomatoes and incurred the other two items of expense and are requesting reimbursement for same.

DECISION.

1. The claim must be denied. There was an unqualified release of the tomatoes by the Food Administration, and the release was made in response to the urgent request of the claimants as contained in two letters, one dated October 30, 1918, addressed to the food administration of Missouri, and which was forwarded to, and received by, the Food Administration at Washington, and the other of November 15, 1918, addressed to the Food Administration at Washington. The Food Administration replied promptly to both of these letters releasing all claim on the tomatoes, and the contract, if any, was thereby terminated by the agreement of both parties to it.

Reference is made to the following authorities:

Clark on Contracts, page 523.

The Garford Motor Truck Co., 1 Board of Contract Adjustment Decisions, page 225.

DISPOSITION.

Claim disallowed.

Col. Delafield and Mr. Howe concurring.

Case No. 1737.

In re CLAIM OF THE PEOPLES GAS LIGHT & COKE CO.

[REHEARING.]

1. **COMPULSORY ORDER—ACT OF MARCH 2, 1919.**—Where claimant received a compulsory order issued under section 120 of the national defense act of June 3, 1918, requiring claimant to deliver to the Government all toluol manufactured between certain dates, and the order was suspended during the named period, there was a contract implied in law by which the Government was bound to take all claimant's toluol produced during the entire period. This contract is within the provisions of the act of March 2, 1919, and is to be adjusted in accordance with the act and the regulations issued thereunder.
2. **AMORTIZATION OF FACILITIES.**—When the above-described contract was suspended, claimant was not entitled to continue production and thus increase the amount to be charged the United States. Claimant is entitled, however, to such amortization of the cost of its increased facilities as would have been accomplished if it had continued to produce toluol until the expiration of the period originally fixed.
3. **CLAIM AND DECISION.**—Rehearing on amended statement of claim and after-discovered evidence. The claim is presented under the act of March 2, 1919, and is based upon a compulsory order for toluol. Held, claimant is entitled to relief under the act.

Mr. Hunt writing the opinion of the Board.

NATURE AND ORIGIN OF CLAIM.

1. By its decision of October 25, 1919, this Board denied the claimant's claim as set forth in its then statement of claim. The claimant having submitted an amended statement of claim to the Chicago district claims board, Ordnance, some time prior to October 25, 1919, which amended statement of claim set out evidence not set out in its original claim, and having applied for a reconsideration of the matter, a reconsideration was recommended by the Committee on Rehearings and the claim heard.

2. At the hearing it appeared that the claimant now seeks to recover the sum of \$173,384.29, payment of which sum in settlement of this claim was recommended by the Chicago district claims board, Ordnance. The claim has been transmitted here by the Ordnance Claims Board pursuant to instructions of the War Department Claims Board. This said sum was arrived at by ascertaining the total quantity of light oil produced by the claimant at its four light-

oil plants during the period of the compulsory order which was not converted into refined toluol. This quantity is stated to have been 850,212 gallons. Of this quantity 288,563 gallons were on hand November 23, 1918. The remaining 561,649 gallons were produced, it is alleged, from November 23, 1918, to December 31, 1918. The toluol recoverable from the 850,212 gallons of light oil would have been 178,543 gallons, which at \$1.50 per gallon amounts to \$267,814.50. The average labor cost per gallon of converting light oil to refined toluol during September, October, and November was \$0.0750 $\frac{3}{4}$. The labor cost for converting 850,212 gallons was thus estimated at \$63,822.58. The light oil was converted into "motor spirits" with a sales value of light oil less the actual cost of conversion (\$0.036 per gallon of light oil) or \$30,607.63 for the 850,212 gallons. The value of the refined toluol at \$1.50 per gallon recoverable from the 850,212 gallons of light oil (\$267,814.50) less the labor cost \$63,822.58 and less the sales value (\$30,607.63) is equal to \$173,384.29.

The question this Board is now called upon to decide is whether the formula applied by the Chicago district claims board as appears above is correct, or if not correct, what formula should be applied.

FINDINGS OF FACT.

The claim of the claimant grows out of compulsory order No. 360 served on the claimant on or about July 2, 1918. A copy of the material portions thereof follow:

" ARMY ORDER.

"Pursuant to the authority of section 120 of the act of Congress approved June 3, 1916, * * * and acting under the direction of the President of the United States, commander in chief of the Army and Navy, an order is hereby placed with you, for purposes connected with the national security and defense, for the entire output of crude and/or refined toluol which your plant or plants are capable of producing from July first, nineteen hundred eighteen, until December thirty-first, nineteen hundred eighteen (both dates inclusive), the said products or material being of the nature and kind usually produced or capable of being produced by you.

"The War Industries Board, through its representative herein designated, J. M. Morehead, chemicals and explosives section, or any other representative which it may in future designate, is hereby authorized and empowered to accept delivery of said products or material; to take possession or to direct delivery thereof for the purposes mentioned above, by waiver or otherwise, and upon such terms and conditions as it may deem necessary; and to make returns to the Director of Purchase, Storage and Traffic, Washington, D. C., of all things done and proceedings had in connection therewith.

* * * * *

"This order will take precedence over all orders or contracts heretofore placed with you by any person whatsoever other than prior orders or contracts by the War Department, the Navy Depart-

ment, or the Shipping Board. You are further notified that by the said act of June 3, 1916, any refusal on your part to give to the United States such preference in the matter of the execution of this order, or any refusal on your part to furnish the above products or materials at a reasonable price, as determined by the Secretary of War, is made a felony and punishable by imprisonment for not more than three years and by a fine of not exceeding \$50,000.

* * * * *

"HUGH S. JOHNSON,
"Brigadier General, N. A., for the
"Director of Purchase, Storage and Traffic.

"With the approval of the Navy Department.

"F. D. ROOSEVELT,
"Assistant Secretary. * * *

Accompanying this order was a letter addressed to the claimant, the material portions of which follow:

WAR INDUSTRIES BOARD,
Washington, June 25, 1918.

Compulsory order No. 500 expires by limitation June 30th, 1918. Compulsory order No. 360, enclosed herewith, places a similar order with you running from midnight June 30th, until midnight December 31, 1918. Previous applicable instructions of this board are hereby continued in effect, and shall apply to the enclosed order.

* * * * *

Applications for releases for refined toluol for nonmilitary purposes will be considered, and if when the urgency of the Government program permits, this board will grant such releases as the situation warrants, at prices recently determined upon, that is, tank cars \$1.50 per gallon; \$1.55 in drums f. o. b. point of production.

Very truly, yours,

J. M. MOREHEAD, * * *

A copy of the material portions of Compulsory Order No. 500 addressed to the claimant, referred to in said letter follows:

Ordinance Compulsory Order Number 500.

WAR DEPARTMENT,
Office of the Chief of Ordnance.

Pursuant to authority of section 120 of the national defense act, approved June 3, 1916 (39 Stat., 213), and acting under the direction of the President of the United States, an order is hereby placed with you for the entire output of toluol which your plant is capable of producing from the date of this order to June 30, 1918, the said product being of the nature and kind usually produced or capable of being produced by you. Compliance with this order is *obligatory*, and takes precedence over all other orders and contracts heretofore placed with you, other than by the War Department, Navy Department, or the Shipping Board.

As it is impracticable now to determine a reasonable and just compensation for the product or material to be delivered, the fixing of the price will be subject to later determination.

You are further advised that upon refusal upon your part to give the United States preference in the matter of the execution of this order, or any refusal to manufacture the kind, quantity, or quality of the product or material covered hereby, as ordered by the Secretary of War, or any refusal to furnish such product or material at the reasonable price determined by the Secretary of War, then, and in either of such cases, the President, through the Secretary of War, is authorized by the said act to take immediate possession of your plants, and through the Ordnance Department of the United States Army to manufacture therein such product or material as may be required, and that such refusal shall be deemed a felony, punishable by imprisonment for not more than three years or by a fine not exceeding \$50,000.

This order is to be receipted for by you and returned to the Office of the Chief of Ordnance, the duplicate to be retained by you.

By direction of the President:

(Signed) NEWTON D. BAKER,
Secretary of War.

Dated FEB. 19th, 1918.

Before the completion of the North and South Station light oil plants and of the refining plant, the Navy Department by Navy Order No. N-697 and by amendment thereto of December 14, 1917, ordered (Rec., p. 46) the production of refined toluol produced by the claimant and by the Public Service Co. of Northern Illinois "to the maximum extent of 100,800 gallons per month from January 1, 1918, to November 30, 1918." The claimant's refining plant was not completed until May, 1918; and before its completion the Aetna Nitrating Plant, in Pennsylvania, which was making T. N. T. for the Navy and to which the claimant's toluol was to be sent, was destroyed by an explosion. Consequently all refined toluol produced by claimant's refining plant was shipped to nitrating plants for the use of the Army, except 29,922 gallons shipped for the use of the Navy and 62,000 gallons on hand after termination of Order No. 360, for which claim is being made from the Navy.

Only chemically pure toluol was delivered by the claimant under Order No. 360.

On April 1, 1918, General Order No. 30 was issued creating the board of appraisers, the relevant portions of which follow:

"II. 1. By direction of the President there is hereby constituted in the War Department a board of appraisers, composed and charged with duties as hereinafter prescribed."

* * * * *

"4. The duties of the board shall be:

"(a) To determine, by appropriate methods, just compensation for all property * * * (1) which shall hereafter during the existing emergency be ordered, * * * or otherwise summarily taken over

according to law, through, by, or by direction of the Secretary of War for the direct and special use of the Army; * * *

"5. The duties of the board being inherently judicial, they will be performed in a judicial manner, with fairness and impartiality, according to law, between the taking or purchasing department, bureau, or officer and the private owner deprived of this property."

On August 19, 1918, the board of appraisers made its "award" with reference to Compulsory Order No. 360, a copy of which award follows:

"AUGUST 19, 1918.

"Upon due consideration the War Department Board of Appraisers finds that the reasonable price at which the former owners designated in Army Compulsory Order No. 360 B/C shall comply with the terms and conditions set forth therein for the manufacture of the commodity specified, is as follows:

"\$1.50 per gallon f. o. b. maker's plant for all toluol produced between July 1, 1918, and December 31st, 1918, both dates inclusive.

"Whereupon the War Department Board of Appraisers awards to the person, firm, or corporation named in said order just compensation for the manufacture of the said commodity in accordance with the terms and provisions of the said order, when inspected and accepted by due authority, at the rate set forth in the preceding paragraph of this instrument, payment to be made upon the certification of the requisitioning authority as to quantity and quality."

* * * * *

This award was made with reference to the 68 orders, including the claimant herein, under compulsory order No. 360. It appears from the minutes of the board of appraisers (June 28, July 9, August 7, 1918, that the price was fixed at \$1.50 per gallon for the reason that the said amount had come to be the standard price for toluol.

On August 31, 1918, the board of appraisers promulgated the following notice:

"360 B/C.

AUGUST 31, 1918.

"To the person, firm, or corporation to whom compulsory order No. 360 B/C is directed:

"By direction of the Secretary of War, the War Department Board of Appraisers has considered the price to be paid by the United States for the property required by the foregoing compulsory order * * * and we have determined that \$1.50 per gallon f. o. b. maker's plant for all toluol produced between July 1, 1918, and December 31, 1918, both dates inclusive, is a reasonable price therefor, and have made an award upon that basis as just compensation for the required property, when provided for and accepted by the United States.

"Notice is hereby given that unless dissent to this price, as unreasonable, is filed with this board within fifteen days from the date of service of this notice, by the person, firm, or corporation addressed therein, it shall be conclusively presumed that hearing thereon is waived and this board will make a final award upon the terms

herein stated, unless upon due notice it is otherwise to be ordered. If notice of dissent to the price herein stated as reasonable is filed, as above provided, the performance of the order is not thereby suspended, but a hearing upon the reasonableness of the price will be afforded upon due notice to you of time and place, and the award of this board made thereafter will be final."

No dissent or protest was ever filed or otherwise taken by the claimant from the award of August 19, 1918.

After the promulgation of the award and notice, the claimant continued to produce and deliver, and the United States to accept and pay for refined toluol.

On November 23, 1918, the claimant received the following telegram:

"Compulsory order number three hundred sixty, dated June twentieth, nineteen eighteen, for crude and/or refined toluol is hereby terminated to take effect seven p. m., November twenty-third, nineteen eighteen, and further performance of this order shall cease at that date and hour. Henceforth all communications regarding this order should be addressed to Procurement Division, explosives branch, Ordnance Dept., Washington, D. C. Please confirm by wire.

"By direction of the Sec'y of War.

"GEO. W. GORTHALS,

"Director of Purchase, Storage and Traffic, General Staff."

This telegram was confirmed by a letter of the same date and to the same effect.

The claimant immediately on notice of the desire of the United States to stop production gave the appropriate instructions and the refining of toluol was stopped except that the process of refinement was completed with regard to light oils in process. (Rec., 105.) The claimant is making claim against the Navy Department for the refined toluol on hand November 23, or produced from the light oils in process of refinement on that day. The production of light oils from gas continued to the extent stated in the second paragraph of this opinion.

Testimony was taken at this and other hearings as to the nature of toluol, the several processes of producing it, the by-products produced in its manufacture, and on related subjects, a summary of the relevant portions of which testimony follows:

The People's Gas Co. of Chicago now supplies that city with gas, and did so prior to and during the "emergency." Its franchise requires the delivery of gas on a heat and not on a candlepower basis. The removal of toluol from its gas has not resulted in the non-fulfillment of its franchise requirements. Toluol is derived principally either by coking coal in by-product coke ovens or by "sweeping" it out of carburetted water gas. Small quantities are also derived from the distillation of tar. Toluol is the basis of the ex-

plosive known as trinitrotoluol, nitrate being the other main ingredient.

In April or May, 1917, a representative of the claimant and of other gas companies and other potential toluol producers conferred with representatives of the Ordnance Bureau, at their request, at the Bureau of Standards. Ordnance officers then stated that the production of toluol in enormously increased quantities was essential to a successful prosecution of the war. Representatives of the gas companies, particularly, were urged to bring about the construction of such plants, as such companies were in an excellent position to produce toluol quickly. (Rec., pp. 52, 53, 54, 55, 56, 59.) The claimant, in addition to the plants it had constructed in March, 1917, at the Division Street Station and at the Twenty-second Street Station in Chicago, proceeded to construct light oil plants at the North Station and the South Station in Chicago, which were completed, respectively, March 1 and February 17, 1918, at a cost of \$255,076 and \$220,617, and also a refining plant at Cicero, Ill., which was completed May 8, 1918, at a cost of \$851,128. (Rec., p. 84.)

The process of recovering "light oil" from carburetted water gas was described in the testimony as follows (Rec., 62):

"The gas, after having passed the usual process of manufacture and through the purifying boxes to remove sulphur, and so forth, is then passed through a tower or cylindrical tank. * * * It is first passed through this tank that is filled with wooden grids. Gas passing up through this tank is met with a downward stream of absorbent oil. This oil absorbs from the gas coming in contact with it what is known as the light oils. They are classed light oils because they contain not only toluol but also benzol, solvent naphtha, and other oils that are commonly termed light oils. The oil passes down through and the gas then leaves the top of the apparatus stripped of its light oils, the oil having absorbed them. The oil is then known as wash oil or absorbent oil. Laden with light oil it is then passed to a steam still which is continuous in its operation; oil passing into the top and through various trays or partitions in the still comes in contact with a column of live steam. * * * The steam ascending through the absorbent oil heats it and relieves the absorbent oil of the light oils absorbed from the gas, they being carried forward with the steam. The wash oil being stripped of its light oils again passes from this apparatus, is cooled, and returns to the absorption towers again. This is a circuit, the oil absorbing and losing its light oil; the light oils being driven off with the steam are run into a condenser. The condenser cools down the temperature of the steam vapors and light oil vapors carried with it to a point of condensation. The light oil floating on top is drawn off in a separate reservoir. The steam, which is condensed water, is lost, is of no further use.

"This light oil carried over and condensed contains benzol, toluol, solvent naphtha, and some other forms of fuel oil, together with

a small portion of the light oil entrained in the operation. That is known as light oil. It contains, according to various operations, twenty-five per cent. and over of toluol."

"Q. By that you mean twenty-five per cent. of pure toluol?"

"A. Pure toluol; yes. We always express it by expressing the content of the pure toluol before sending it to the refining plants.

"Of course, there was other apparatus, such as pumps and auxiliary machines. This light oil, after being received in a container by itself, was then sent to a refining plant."

"The light oil was transported by rail in tank cars to the refining plant at Cicero, Ill."

The process of the recovery of toluol from light oils was thus described.

"The first process in the refining plant was to place light oil in a large drum, known as a still, in which it was heated with steam coils. Above this still was a deflected column by which a definite temperature control could be maintained. As the steam coils of the still were filled and the steam turned on, naturally the first oil to be evaporated would be that which evaporated at the lowest temperatures and was the means of separation of these various oils, because they had various boiling points. The first oils to come over were the benzol series, and the temperature at the top of the still was definitely regulated so that none of the rest of the oils that came over there were drawn back into the still, so that this process was worked along slowly at this given temperature at the top until all the benzol was extracted from the light oil. Then the final temperature of the still was raised to the boiling point of pure toluol or crude toluol. This is the crude still operation. The still was then kept at this temperature until all the toluol oils were boiled out. Then the temperature was again raised and solvents were boiled out. What was left in the still was known as residual, which were some of the very heavy solvents, and also a wash oil that was entrained in the previous operation. They were again returned to the plants.

"Now, we have three products from that still; crude benzol, crude toluol, and crude solvents.

"Q. What percentage of the pure toluol did crude toluol have in it?"

"A. It ran from sixty-five to seventy per cent. of pure toluol. With us in our operation the crude benzol and the crude solvents were again set back and put into the gas. We could not afford to lose that heating value from the gas, and we kept out only the crude toluol section. That crude toluol section was then sent to what is known as a washer, in which the impurities, a large portion of the impurities, were washed with sulphuric acid. In other words, the sulphuric acid attracts a number of these impurities. Then, to neutralize the acid effect, it received a wash of caustic soda. In that state it was known as washed crude toluol. It was then returned to what is known as a pure toluol still. Again that process of boiling was maintained similarly as described in producing pure toluol. There would be a little pure benzol entrained. We had to be very careful to separate that out definitely. Then the temperature was raised and pure toluol came over. The still residue then might contain a little pure toluol,

which was thrown off, and the balance was a heavy, viscous, tarry mass, the result of the washing of the acid on the other materials in the crude toluol. * * * The color * * * went by specifications that it should be water white; that it should pass an acid test to determine that the impurities were out of it, so it would be suitable for nitrating purposes, and these impurities must be eliminated down to a point determined in the test. Also, to be sure that there was not benzol and solvents mixed up in it, there was no determination that it must boil within two degrees of the true boiling point of chemically pure toluol."

DECISION.

The pertinent portions of section 120 of the act of June 3, 1916, follow:

"The President, in time of war or when war is imminent, is empowered through the head of any department of the Government in addition to the present authorized methods of purchase or procurement, to place an order with any individual, etc., * * * for such product or material as may be required * * *."

"Compliance with all such orders * * * shall be obligatory on any individual * * * and any individual owning or operating any plant equipped for the manufacture of * * * necessary supplies * * * for the Army * * * which, in the opinion of the Secretary of War, shall be capable of being readily transformed into a plant for the manufacture of * * * necessary supplies * * * who shall refuse * * * to manufacture * * * necessary supplies * * * as ordered by the Secretary of War, or who shall refuse to furnish such * * * supplies * * * at a reasonable price as determined by the Secretary of War, then and in either such case the President, through the head of any department of the Government, in addition to the present authorized methods of purchase or procurement herein provided for, is hereby authorized to take immediate possession of any such plant or plants and through the Ordnance Department of the United States Army to manufacture therein, in time of war or when war shall be imminent * * * such material as may be required, and any individual * * * failing to comply with the provisions of this section shall be deemed guilty of a felony * * *."

"Compensation to be paid to any individual * * * for its products or material * * * shall be fair and just."

Just what is it for which compensation is authorized to be paid? By the first paragraph the President is empowered to place an order for such product or material as may be required. Compliance with the order for the product so determined to be required is obligatory. Compensation to be paid the orderer for its products is to be fair and just. The product for which compensation is to be paid is the product determined to be required by the President as evidenced by the compulsory order.

Compulsory Order No. 360 was placed with the claimant "by direction of the President" and pursuant to section 120 of the act of

June 3, 1916. The order was for "the entire output of crude and/or refined toluol which your plant or plants are capable of producing from July 1, 1918, until December 31, 1918 (both dates inclusive)." This then is the "product" for which just compensation is to be paid.

No price was named in the order and no price was fixed by the Secretary of War until the board of appraisers fixed the price on August 19, 1918. It appears, however, that toluol delivered under Order No. 500 was at the price of \$1.50 per gallon, and that a number of contracts had been made by the Ordnance Bureau at that price; \$1.50 per gallon was the standard price at this time paid by the United States and by such private consumers as the United States permitted to purchase. The Navy was paying \$1.50 per gallon for its toluol during this period. (Minutes Bd. App.)

What is the legal relation between the parties established by the service of Order No. 360, the acts of the claimant and the United States with relation thereto, the action of the board of appraisers of August 19, 1918, and the acts of the claimant and the United States in that connection?

This legal relation is that of parties bound by an adjudication, under due process of law, by a tribunal having jurisdiction of the subject matter, the award of August 19 constituting said adjudication.

The "award" of August 19 constituted a determination by a competent tribunal of fair and just compensation under the act of June 3, 1916 (sec. 120), for the product of the claimant taken by the United States under Compulsory Order No. 360 and a determination by the Secretary of War of a reasonable price at which the products ordered should be furnished under pain of the penal provisions of the act.

The board of appraisers made their award of just compensation for the manufacture of the said commodity in accordance with the terms and provisions of the order at the rate of \$1.50 per gallon, f. o. b. makers plant for all toluol produced between July 1, 1918, and December 31, 1918. The board of appraisers by the same instrument found the reasonable price at which the former owners shall comply with the order to be \$1.50 per gallon for all toluol produced between July 1, 1918, and December 31, 1918. The orderee was notified on August 31, 1918, to file its dissent from this award if dissatisfied. No dissent was filed.

Just and fair compensation was adjudicated to be \$1.50 per gallon for all toluol produced between specified dates. No proceedings having been taken by the orderee from this adjudication either before the board of appraisers or the courts, and the orderee having continued to manufacture and deliver toluol and to accept the price stated, and the United States having continued to accept the said

toluol and pay for it at the said price, the said adjudication became fixed and binding upon both parties. It was thereafter the obligation of the United States to accept and pay the said price for all toluol produced by the orderee during the period specified up to and including December 31, 1918.

This obligation is an agreement implied by law within section 1 of the act of March 2, 1919.

The act of March 2 gives the Secretary of War power to adjust, pay, or discharge "any agreement, express or implied" entered into by an officer or agent acting under the authority, direction, or instruction of the President and not executed in the manner prescribed by law. The power to adjust implied agreements includes agreements implied in law as well as in fact. The act is remedial and should be liberally construed to effectuate its purpose, which is broadly to confer power on the Secretary of War to adjust those Army emergency agreements which he had not already power to adjust. He had power to adjust such agreements only as were executed in the manner prescribed by law. There is no "manner prescribed by law" for the execution of a quasi-contractual obligation. Hence the words "and not executed in the manner prescribed by law" should be construed to be a limitation on the power given the Secretary of War with regard only to agreements for the execution of which there was a manner prescribed by law. Those words are not applicable to agreements raised by implication of law.

"Quasi-contracts" may be said to be founded—

1. Upon a record.
2. Upon a statutory or official or customary duty.

See *Louisiana v. New Orleans*. (109 U. S., 285.)

Steamship Co. v. Joliffe. (2 Wall., 450.)

The adjudication of the board of appraisers is a "record" or judgment. Section 120 of the act of June 3, 1916, creates a statutory duty.

Prof. Woodward divides quasi-contracts into four classes.

His third class is, "benefits conferred under constraint."

It is evident that there is an "implied agreement" within the meaning of the act of March 2, 1919, which is quasi-contractual in its nature by virtue of which the United States is under obligation to pay the claimant "fair and just" compensation as authorized by the act of Congress and determined by the award.

The situation is substantially the same as it would be if the claimant had made an express contract for the sale of its entire product between July 1, 1918, and December 31, 1918, to the United States.

In that case the relief to which the claimant would be entitled is that provided for in Supply Circular 111 and Supply Circular 19.

It is entitled to the difference between the cost of the raw materials it had purchased or obligated itself for at the time of the suspension request and their salvage value.

It is also entitled to the unabsorbed amortization of the plants which it constructed at the request of the United States, which were utilized in the production of toluol under the compulsory orders numbered 500 and 360.

The determination by the board of appraisers of a price of \$1.50 per gallon during the entire period between July 1, 1918, and December 31, 1918, as a reasonable price and as just compensation, is subject to the qualification or addition that the entire product of the claimant during that period should be taken at that price.

The board of appraisers have not determined that the price of \$1.50 per gallon is just compensation in case less than the entire product of the claimant between July 1 and December 31, 1918, is taken.

We must assume that the board of appraisers considered, in fixing just compensation, the fact that the claimant erected expensive plants for the production of toluol, which would be of small value after the war demand for toluol had ceased, and acted in the belief that the entire product between July 1 and December 31, 1918, would be taken at \$1.50 per gallon.

The action of the claimant after receiving notice to suspend or to terminate production on November 23, 1918, in continuing the production of light oils, was for its own benefit and should not increase the amount to be charged the United States; 61,723 gallons of crude toluol were, however, in the final process of distillation at that time. The completion of distillation of this quantity was proper. (Record, p. 105.)

It appears, however, that claim is being made against the Navy for payment for this 61,723 gallons of refined toluol.

It is entitled to such amortization of the cost of its plants as would have been accomplished if it had continued to produce chemically pure toluol until December 31, 1918, and had received the price of \$1.50 per gallon therefor.

It is clear from the conduct of the parties herein that both contemplated their statutory duty and obligation under the adjudication of the board of appraisers to be the production and delivery of refined toluol only, and the statutory duty of the United States to pay \$1.50 per gallon for refined toluol only. Under those circumstances no question arises in this case as to the rule of compensation for crude toluol.

DISPOSITION.

This claim will be transmitted to the Claims Board, Bureau of Ordnance, for further proceedings pursuant to the decision herein. Col. Delafield, Mr. Bryant, and Mr. Montgomery concurring.

Case No. 333.

In re CLAIM OF HENRY SONNEBORN & CO. (INC.).

1. **NEGOTIATIONS MERGED IN WRITTEN AGREEMENT.**—All negotiations and oral understandings are merged in a written agreement covering the same subject matter.
2. **FORMAL CONTRACT FULLY PERFORMED—JURISDICTION.**—The Secretary of War and this Board have no jurisdiction to give relief where a formal contract has been fully performed.
3. **AWARD IS AN AGREEMENT.**—Notification of an award of a contract constitutes an agreement under which claimant may be entitled to relief under the act of March 2, 1919.
4. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon (1) oral understandings in connection with a formal contract for the manufacture of mackinaws and (2) the award of a second contract for mackinaws. Held, claimant is not entitled to the item of its claim which is based upon the first contract, but is entitled to relief under its second contract.

Mr. Harding writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$14,931.52 by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Henry Sonneborn & Co. (Inc.), of Baltimore, Md., had established a factory for the purpose of taking over and performing Government contracts. A formal contract, No. 6781-N, was entered into between the claimant and the Government which on its face bears date September 30, 1918, but was not formerly completed, executed, or delivered prior to the middle of October, 1918. By that contract the claimant agreed to deliver to the Government 75,000 mackinaw jackets at a price of \$1.50 per garment. While the contract was in process of negotiation during the latter week of September, 1918, and up to near the middle of October, 1918, a discussion arose between the claimant and the representatives of the Government who had in charge the procurement of the goods, to wit, J. C. Perry and Harry L. Wells, clothing section, manufacturing branch, Quartermaster Corps. Harry L. Wells was at about that time Acting Chief of the uniform division. The discussion concerned the cost of manu-

facture and the price of \$1.50 per garment which was the Government price offered. After the claimant began operations under its contract in October, 1918, there were some labor disputes in its factory, which Mr. Trevesano of the Government arbitration board was sent over to adjust. The work was then in process. The claimant alleges that the basic price of labor fixed by Mr. Trevesano to settle the labor difficulties raised the manufacturing cost of such garments to \$1.62½ each. And thereupon the claimant alleges that the Government representatives said to it that if it would go on with the contract and manufacture the goods at the price named therein, to wit, \$1.50 per garment, it would be given another Government contract later at a higher price. This was after claimant became obligated under its contract.

2. The Government representative, Harry L. Wells, testified at the hearing that no promise of a second contract was made to the claimant but that it was said to it that all subsequent contracts, if any, would be written at \$1.75 per garment, but that no contract was definitely promised. He also testified that the price fixed in either contract was not fixed with reference to the price fixed in the other.

3. On or about November 4, 1918, another contract, No. 7938-N, was awarded to the claimant, the award being signed by Harry L. Wells, acting chief of the uniform section, which award was notified to the claimant on or about that time, and Harry L. Wells was authorized on November 6, 1918, to execute without submission to the Board of Review. This award was for the manufacture of 75,000 mackinaws at a price of \$1.75 per garment, delivery, depot quartermaster, New York.

"25,000 week ending December 14, 1918.

"25,000 week ending December 21, 1918.

"25,000 week ending December 28, 1918."

The formal contract never was executed or delivered because of the armistice. The claimant files its claim made up of the following items:

Loss of 12½¢ per garment on 75,000 mackinaws mnfd.....	\$9,375.00
Loss on direct materials supplied by us and not used.....	4,627.96
Loss on indirect materials supplied by us and not used.....	277.00
Loss on labor for checking and returning Government materials.....	557.96
Loss on insurance covering mackinaw materials.....	93.60
A total of.....	14,931.52
The claimant of its own motion has reduced its claim:	
Labor for returning material to Government by.....	\$167.96
Claim for labels by.....	15.00
	182.96
Leaving its net claim.....	14,748.56

4. The claimant completed the delivery of the goods under the formal contract. 6781-N. and received therefor the price agreed in

the contract. The last of the goods were delivered some time after the middle of December, 1918, and the contract was terminated not only by performance but by lapse of time.

5. The second alleged contract, 7938-N, was never performed or performance entered upon, the armistice having occurred before the complete performance of the first contract.

DECISION.

1. The first contract, No. 6781-N, being a written formal contract, all of the conversations, negotiations, and supposed verbal agreements entered into before its execution and delivery were merged in it. This is a familiar principle of law and this Board has frequently so held.

Also, it being a formal written contract, and having been fully performed by both parties and terminated, the Secretary of War and this Board have no jurisdiction to deal with it further, hence the item \$9,375 in claimant's claim as loss on that contract must be disallowed.

2. The claimant, however, is entitled to such loss, if any, as can be shown upon the so-called contract No. 7938-N, to be adjusted in accordance with the principles laid down in the act of March 2, 1919, but not including the item of \$9,375, or any part of it. The negotiations upon this contract, while not ripening into a formal contract, consist of a written award signed by Harry L. Wells, acting chief of the uniform section, the delivery of the goods to claimant from which to make the garments, and the acceptance by the claimant. It was a mere accident that the formal contract was not executed and delivered.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Hamilton concurring.

Case No. 615.

In re CLAIM OF FORD MOTOR CO.

1. **IMPLIED CONTRACT—EXTRA LABOR AND MATERIAL.**—Where claimant had performed a contract providing for a maximum fee for the manufacture of armor out of material furnished by the Government, and the armor has been manufactured, delivered and paid for on the basis of the contract, claimant may recover the expenses of buying two barrels of paint and for certain extra labor not contemplated by the parties when the contract was executed in preparing raw materials furnished it by the Government, under instructions from an authorized agent of the Government.
2. **OVERHEAD—WHERE CONTRACT TERMINATED.**—Claimant is not entitled to an adjustment for additional overhead resulting from the failure of the Government to furnish material within a reasonable time, as such an item would be in the nature of unliquidated damages growing out of the breach of the contract. Since the contract was fully performed, and payment for the armor made and accepted, the contract will be considered closed and cannot be revived by the Secretary of War for the purpose of allowing additional overhead charges.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for two barrels of paint, extra labor and additional overhead in performing a procurement order with a maximum fee for manufacturing armor out of materials furnished by the Government. Held, claimant entitled to adjustment for the paint and extra labor, but not for additional overhead.

Lieut. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division, Supply Circular No. 17, 1918, for \$840.59 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant in this case was operating under a formal purchase order for painting, assembling, and packing for export 5,000 sets front body armor, and 5,000 sets back body armor, same to be accomplished within 60 days, with a maximum fee of \$15,500. The Government was to furnish the raw materials for the performance of this order. The contract was performed, the goods delivered by claimant, and accepted by the Government, and the claimant has received in payment therefor the sum of \$15,292 45.

3. The claimant has alleged, and facts sustain the allegation, that in the performance of its part of the contract its cost (including the 10 per cent. profit) was \$16,133.04, or \$633.04 above the maximum allowance provided in the procurement order. This extra expense was occasioned by the purchase of two barrels of paint in open market in accordance with instructions received from an authorized agent of the Government; by the cost of additional labor in preparing the raw material furnished by the Government so that it could be used in the fulfillment of the contract; and by increased overhead expenditures, the same resulting from the Government's failure to deliver the raw material within a reasonable time and thus enable the claimant to perform its contract within the time specified.

DECISION.

1. The Board finds that there is an implied agreement on the part of the Government to reimburse claimant for the two barrels of paint and the extra labor occasioned in preparing the material furnished by the Government for use in the performance of the Government order. It appears that this additional work in removing rust, recutting, and otherwise preparing the material furnished by the Government for the performance of this contract was not contemplated in the original procurement order, but was done with the knowledge and acquiescence of the Government, and the Government has received the benefit therefrom. However, the Board is of the opinion that it is without authority to make an adjustment on the overhead expense item in view of the fact that this is considered unliquidated damages growing out of a breach of the contract on the part of the Government. The evidence shows that the contract was fully performed by the claimant, the goods delivered and accepted by the Government, and all payments have been received for same with the exception of \$240.59. In view of this fact, the contract would be considered closed and could not be revived by the Secretary of War.

An award will be made the claimant reimbursing it for the two barrels of paint and extra labor occasioned in the performance of the contract.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement, and certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Shirk concurring.

Case No. 2256.

In re CLAIM OF NORTHWESTERN MANUFACTURING CO.

1. **NEGOTIATIONS MERGED IN WRITTEN CONTRACT—RIGHT OF REFORMATION WAIVED.**—Where claimant, in making bids, stated in its bid that if freight rates should be advanced at time of shipment, additional freight charges would be added to its prices, but the written contract contained no such provision, and claimant went ahead, performed the contract, and received payment at the price fixed therein without protest, it is not entitled to be paid the amount of the additional freight charges.
2. **CONSIDERATION.**—Where, under the above circumstances, after the contract has been fully performed, a supplemental agreement is executed containing the provision regarding freight charges which had been omitted in the original contract, the supplemental agreement is without consideration and void.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a proxy-signed agreement supplemental to a proxy-signed contract, for barrack chairs. Held, claimant is not entitled to relief.

Mr. Bayne writing the opinion of the Board.

This is a claim, class A, for \$66.66 for freight charges on materials ordered under proxy-signed written agreement. The matter comes to this Board on appeal from a decision of the classification claims board, settlement division, Office of the Director of Finance, United States Army.

There has been no hearing.

This Board finds and decides as follows:

1. Claimant in making bids on parts for barracks chairs June 11, 1917, to the Philadelphia depot quartermaster, United States Army, stated in this bid that prices quoted were figured at the then tariff rates and that if they should be advanced at the time of shipment, claimant would add to its prices the additional freight charge. Thereafter contract No. 1481, dated June 30, 1917, was proxy-signed on the part of the Government; it was also signed by claimant and copy sent to it July 31, 1917. The contract did not contain any provision for any adjustment in the event of changes in the freight rates as referred to in the bid as above mentioned.

2. The contract was thereafter fully performed by both parties.

3. Claimant did not bring the matter of his claim herein to the attention of the depot quartermaster until October 16, 1917, after the expiration of the contract, when it called attention to said reservation in its bid. Claimant then claimed the increase in the freight

rate figured in the contract, 37½ cents against 44 cents which claimant had actually to pay. In pursuance of claimant's request, a supplementary agreement, proxy-signed, was executed October 31, 1917, inserting in substance the clause contained in the bid, but which had been omitted in the contract thereafter signed and performed without objection by claimant.

4. Claimant now seeks reimbursement on the basis of said supplementary agreement.

DECISION.

1. Claimant having accepted said contract without objection on account of the omission of said clause in the bid providing for its protection in case of an increase of rate, thereby waived any such reservation, and all preliminary negotiations were merged in the written agreement; and claimant having knowingly accepted and performed said agreement without objection at any time until after the contract was fully performed by both sides, thereby waived the omission of said matter in the contract as executed that might have been inserted had the parties so agreed.

2. The supplemental agreement was without consideration and void as against the Government in that it sought to give a claim to claimant, to which, under the facts and the law, it was not entitled, and for which the Government received nothing in return.

3. An order should be made denying the relief prayed for by claimant in its statement of claim and dismissing the claim.

DISPOSITION.

An order should be made denying the relief prayed for by claimant in its statement of claim and dismissing the claim.

Col. Delafield and Mr. Hunt concurring.

Case No. 2406.

In re **CLAIM OF A. B. SEE ELECTRIC ELEVATOR CO.**

- 1. AUTHORITY TO AMEND CONTRACTS.**—Where a construction manager for the erection of a plant is appointed under a formally executed contract, which provides that the construction manager may enter into contracts for the necessary labor and services, with the approval of the special director, who is appointed by the Secretary of War in writing, such construction manager, with the approval of an assistant director appointed in writing by the special director, is duly authorized to amend a formal contract, in the interest of the Government.
- 2. CLAIM AND DECISION.**—Claim under General Order 103 for services of a mechanic, Held, claimant entitled to recover.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. The claim comes to the Board of Contract Adjustment from Office Director of Finance, War Department, requesting that the Board of Contract Adjustment take necessary action. The case may be considered in the nature of an appeal under General Order 103.

2. Under a formally executed contract, dated January 18, 1918, Thompson-Starrett Co. was designated as construction manager, acting under the direction of D. C. Jackling, special director, for the purpose of planning, creating, laying out, constructing, erecting, and installing near Charleston, W. Va., United States Government Explosive Plant C.

3. The preamble of the formally executed contract sets forth in part:

“Whereas, D. C. Jackling, of San Francisco, California, under authority given him by letter dated December 15, 1917, signed by the honorable Newton D. Baker, Secretary of War, was appointed special director with full power and authority to represent the United States of America in the construction of this plant and hereafter referred to as special director.”

4. Article 7 of said contract authorizes the construction manager, with the approval of the special director, to enter into all contracts for services, labor, supplies, material, equipment, and facilities, as agent for the United States of America.

5. Article 8 provides that pay rolls for labor and compensation for services performed and expenses incurred shall be submitted

to the special director for approval or ratification and upon such approval or ratification the disbursing officer shall promptly provide and pay the amounts required for such pay rolls, expense accounts, invoices and contracts.

6. Article 22 provides—

“ * * * and, wherever, with the exception in articles 9 and 14, the words *special director* are used herein, the same shall be construed to include his duly authorized representatives or successors.”

7. On January 23, 1918, D. C. Jackling, special director, in writing delegated to John K. MacGowan the following powers:

To whom it may concern:

Take notice that I, D. C. Jackling, special director in charge of construction and operation of plants for manufacture of smokeless powder, by order of the Hon. Newton D. Baker, Secretary of War, dated December 15th, 1917, supplemented by a contract between Thompson-Starrett Company and I. W. Littell, Brigadier General, N. A., as contracting officer for the United States of America, and dated January 18th, 1918, by the terms of which I retain certain powers of supervision, direction, approval, ratification, discretion, and execution, with powers of delegation of the same, hereby duly *appoint and authorize John K. MacGowan* as an assistant to the director in the division of materials and purchases, with full power and authority to exercise the functions reserved to me in said contract as fully as I might exercise them (with the exception of the powers reserved to me personally under articles 9 and 14 of said contract).

I reserve the right to cancel this authorization at any time by notice in writing.

(Sgd.)

D. J. JACKLING,
Special Director.

Dated New York City, Jan. 23rd, 1918.

8. On April 20, 1918, Thompson-Starrett Co., construction manager, placed Purchase Order No. 15138 with the A. B. See Electric Elevator Co., calling for four elevators for purification houses for \$4,105 each, an aggregate of \$16,420, to be completed by May 20, 1918. Said order contained the following provision:

“ Vendor agrees to provide mechanic to superintend erection of these elevators for the additional sum of \$12.50 per day. This amount includes all expenses.”

9. On October 21, 1919, the United States of America, Thompson-Starrett Co., agent, with the authorization and approval of J. K. MacGowan, assistant director, formally issued an amendment to Purchase Order No. 15138, changing the above clause to read as follows:

“ Vendor agrees to provide mechanic to superintendent erection of these elevators for the additional sum of \$12.50 per day of eight (8) hours. This amount includes all expenses. In the event of the necessity for working overtime, each hour over the above-mentioned eight hours to be doubled and such doubled time paid for at the rate of \$7.00 for each eight (8) hours.”

10. On November 20, 1918, the A. B. See Electric Elevator Co. presented voucher for \$2,252.50 for services rendered by its mechanic in installing the elevators covered by the purchase order. The invoices supporting the voucher are dated December 1, 1918, and indicate that the services were rendered between July 7, 1918, and November 23, 1918.

11. The disbursing officer questioned the authority of the Thompson-Starrett Co. to modify the terms of the purchase order and declined to make payment without further instructions.

12. The contract under which Thompson-Starrett Co. were operating as construction manager and agent for the United States, specifically confers very broad power to the said Thompson-Starrett Co., provided their acts have the approval or ratification of the special director. The amendment to the purchase order appears to have been issued in due form and was authorized and approved by J. K. MacGowan, assistant director.

13. There is no question as to the authority of J. K. MacGowan, assistant director, to approve or ratify contracts entered into by the Thompson-Starrett Co. The voucher is certified to, both by the Thompson-Starrett Co. and the Government.

DECISION.

1. The purchase order and the amendment thereto having been issued in due form under the authority conferred by the contract, dated January 18, 1918, and having been approved by John K. MacGowan, assistant to the special director, and the vouchers having been duly approved by Thompson-Starrett Co., and by R. J. Graham, deputy director, the terms of the contract have been fully complied with and the same should be paid.

DISPOSITION.

1. This Board hereby transmits its findings and decision to the Director of Finance for action in accordance therewith.

Col. Delafield and Mr. Averill concurring.

Case No. 1810.

In re CLAIM OF JAMES ROBERTSON LEAD WORKS.

1. **SUSPENSION OF CONTRACT—ALLOTMENT—RAW MATERIAL.**—Where claimant agreed to pay the Government price for all pig lead allotted to it for the purpose of manufacturing sheet lead and lead pipes for Edgewood Arsenal and sell it back to the Government at the cost price plus the cost of converting it into the articles manufactured for the Government, there arose an implied obligation, under the act of March 2, 1919, to reimburse claimant for his loss occasioned by having on hand a surplus allotment when its contract for the manufacture of the articles was suspended.
2. **CLAIM AND DECISION.**—This claim, in the sum of \$28,673.15, arises under the act of March 2, 1919, for 355,275 pounds of pig lead allotted to and paid for by claimant. Held, that there was an agreement within the purview of the act of March 2, 1919, to reimburse claimant for the loss sustained.

Mr. Patterson writing the opinion of the Board.

FINDINGS OF FACT AND DECISION.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, was filed and received by the Board of Contract Adjustment of Edgewood Arsenal, Chemical Warfare Service, May 23, 1919, and forwarded to this Board August 15, 1919, by Claims Board, Chemical Warfare Service.

The sum claimed is \$28,673.15, representing the price at which 355,272 pounds of pig lead was allotted to and paid for by claimant, it being claimant's contention that said lead was purchased by it for account of the United States Government. Claimant's offer to adjust the matter is set forth in Finding of Fact XII.

FINDINGS OF FACT.

The Board finds the following to be the facts:

I.—Claimant, James Robertson Lead Works, is a corporation having its principal place of business at Baltimore, Md., and is a subsidiary of United Lead Co., a corporation having its principal place of business in New York, N. Y.

II.—On June 13, 1918, and at subsequent times hereinafter mentioned, Capt. George E. Morrissey, Ordnance Reserve Corps, was chief of the purchase section at Edgewood Arsenal, Md. Capt.

R. M. Clucas, Ordnance Reserve Corps, was assistant to Capt. Morrissey. Capt. Clucas was afterwards transferred to Chemical Warfare Service. Lieut. Robert W. Weeks and Pvt. Meyer were also on duty at said Edgewood Arsenal in the Chemical Warfare Service in connection with the construction work.

III.—Shortly after the declaration of a state of war between the United States of America and the German Empire on April 6, 1917, J. R. Wettstein, president of said United Lead Co., conferred with authorities at Washington who were then in charge of the obtaining a supply of lead for governmental purposes and tendered them the facilities of the United States Lead Co. and all of its branches. Thereafter the control of pig lead was assumed by the War Industries Board through its nonferrous metals section. Mr. Wettstein, on behalf of said lead company and as its president, agreed with said nonferrous metals section to finance any allotments of pig lead made for war work for Government account, to pay for such lead when received by it, and to bill the manufactured products made therefrom to Government contractors and arsenals, using the price which said company was charged for the lead as a basis of cost. This offer was frequently acted upon by the War Industries Board, and continued in force at least until the armistice of November 11, 1918.

IV.—The demands of Edgewood Arsenal for sheet lead and lead pipe were large and continuous. On or about February 12, 1918, Capt. Morrissey, aforesaid, wrote to the United Lead Co. asking for a quotation on its products, which quotation was furnished on February 14, 1918, and was based upon the Government allocating the necessary raw material. On February 18, 1918, Lieut. Weeks aforesaid telephoned an order to the United Lead Co. at its New York office for certain lead materials upon the basis of said quotation, which order was also based upon the Government allocating the necessary lead, such lead to be paid for by the United Lead Co. and to be billed to the Edgewood Arsenal at its purchase price, f. o. b. Baltimore, Md., plus a converting charge. A number of other orders were subsequently issued from Edgewood Arsenal to United Lead Co., transmitted by the latter to claimant and filled by it. The first orders were filled by claimant from its own stock of pig lead; the later ones from lead received and paid for by it under Government allocations procured from Capt. Clucas aforesaid.

V.—In order to eliminate the delay of several days resulting from the Edgewood Arsenal authorities sending their orders to United Lead Co. in New York and the transmission of such orders to claimant in Baltimore for attention, Capt. Clucas took up the matter with C. E. McPhail, claimant's manager, on June 13, 1918. As a result of this interview the following letter was written and sent to claimant:

(Copy.)

JUNE 13, 1918.

Subject: Lead.

Messrs. JAMES ROBERTSON LEAD CO.,

827 S. Howard St., Baltimore, Md.

GENTLEMEN: 1. As agreed this afternoon between Mr. McPhail, Captain R. M. Clucas, and Private Meyer, a formal order for lead delivered by the James Robertson Lead Co. to the Edgewood Arsenal during the month of May will be drawn at once.

2. Lead delivered so far during the month of June, and for which the price is not available at this time, will be confirmed by letter as soon as Mr. McPhail and Lieut. Wadsworth arrive at an agreement as to just what has been furnished.

3. For lead needed by the Edgewood Arsenal for the balance of June and subsequent months it is agreed that this material will be furnished by the James Robertson Lead Co. upon receipt of either a letter signed by the purchase section or a telephone conversation from the purchase section subsequently confirmed by letter.

4. At the end of each month Mr. McPhail will send to the purchase section a statement of all lead furnished during that month, the items being carried out into dollars and cents according to the prevailing prices during that month. Upon receipt of this statement a formal procurement order will be issued and sent to the United Lead Co., 111 Broadway, New York, N. Y., thereby necessitating but one purchase order for each month.

Respectfully, yours,

PURCHASE SECTION,

GEO. E. MORRISSEY,

Captain, Ord. R. C.

By R. M. CLUCAS,

Captain, Ord. R. C.

VI.—The arrangement and agreement embodied in the letter set forth in the preceding finding was thereafter carried out and a regular course of business established between the Edgewood Arsenal and claimant, whereby orders for sheet lead and lead pipe were transmitted to claimant, generally by telephone, by Lieut. Weeks, Pvt. Meyer, and others. This was a matter of almost daily occurrence. The articles ordered were shipped promptly and receipts taken from the officer to whom delivery was made. At the end of each month Capt. Clucas would issue formal purchase orders for the articles delivered during the month. This course of business was ordinarily referred to between the parties as a "running account."

VII.—The first allotment of pig lead received by claimant in the foregoing arrangement was 37½ tons on allotment No. 1146—War. Thereafter, as the requirements at the arsenal became greater, an allotment of 300 tons was made to claimant on allotment No. 1239—War. On September 25, 1918, Capt. Clucas requested claimant to advise him as to the status of the 300-ton allotment, and was ad-

vised that the approximate tonnage of orders in excess of said allotment was 38,628 pounds. Accordingly, on October 4, 1918, Capt. Clucas requested a further allotment to claimant of 200 tons, which allotment was made on allotment No. 41537-War.

VIII.—On November 20, 1918, Capt. Clucas wrote the following letter, which was duly received by claimant:

[Copy.]

RMC/1am

In replying, refer to No. E. A. 164/446.

EDGEWOOD ARSENAL,
HEADQUARTERS 311 W. MONUMENT ST.,
Baltimore, Md., November 20, 1918.

JAMES ROBERTSON LEAD CO.,
327 S. Howard St., Baltimore, Md.

(Attention of Mr. McPhail.)

GENTLEMEN: 1. Confirming conversation of this morning, please be advised that it will not be necessary for you to proceed with the work on or shipment of any of the orders placed with your company by this office.

2. This letter should not be taken as a cancellation, but merely as a suspension until it can be definitely determined just what course will be taken as a result in the change of the war program.

3. As soon as this information is available you will be definitely advised regarding the disposition of the outstanding orders and the pig lead allotted for use on work for this arsenal.

Respectfully, yours,

PURCHASE SECTION,
By (signed) R. M. CLUCAS,
Captain, C. W. S., U. S. A.

IX.—Upon receipt of the letter set forth in the foregoing Finding VIII, claimant, through United Lead Co. took steps to have any unshipped portion of said last-mentioned allotment for 200 tons canceled, with the result that a cancellation of 43 tons was effected and said allotment 1537-War was changed to read 1537-War-Revised for 157 tons. This 157 tons, as well as the 37½ tons and the 300 tons covered by the two previous allotments, were all received and paid for by claimant.

X.—On November 21, 1918, at the request of Capt. Clucas, claimant canceled all unfilled portions of orders for sheet lead and other articles for Edgewood Arsenal, and upon the further request of Capt. Clucas furnished the following statement of pig lead on hand allotted to it on allotments 1239-War and 1537-War-Revised:

(COPY.)

Pig lead allotted on Government allotment 1239-War_ 599,984 lbs.
Manufactured products delivered against above_____ 558,750 lbs.

Pig lead on hand in excess of orders_____ 41,234 lbs.
Pig lead allotted on Government allotment 1537-
War-Revised_____ 314,038 lbs.
Deliveries against same_____ 314,038 lbs.

Unused pig lead on hand on above two allotments_____ 355,272 lbs.

XI.—The allotment price under allotment No. 1239—War was \$8.0796 per 100 pounds. The price under allotment No. 1537—War—Revised was \$8.0696 per 100 pounds. The amount claimed is therefore computed by claimant in its statement of claim as follows:

41, 234 lbs. pig lead, being unused balance on allotment 1239—War	
@ \$8.0796 per 100 lbs.-----	\$3, 331. 54
314, 038 lbs. pig lead, being unused balance on allotment 1537—War—	
Revised, @ \$8.0696 per 100 lbs.-----	25, 341. 61
355, 272 lbs. Total-----	28, 673. 15

XII.—Said 355,272 pounds of lead are still in claimant's possession. In said statement of claim, claimant offers either to ship said lead to such destination as it may be directed upon being reimbursed by the United States in the sum so paid and expended by it therefor, or to purchase it at the market price ruling at the time of settlement, with proper adjustments on account of interest charges.

The Board of Contract Adjustment, Chemical Warfare Service, has examined the claim, approved the same in principle, and recommended that the alternative proposed by the contractor be accepted and that the Government pay to the contractor the difference between the cost of the lead and its market price at the date of settlement, with interest at 6 per cent from the date of the armistice until the date of settlement.

CONCLUSION.

There was an agreement within the purview of the act of March 2, 1919, between the United States of America, acting by Capt. R. M. Clucas, Chemical Warfare Service, and claimant, whereby claimant agreed to pay for, at the Government price, such pig lead as might be allocated to it by the lead committee, nonferrous metals section, War Industries Board, for conversion into sheet lead, lead pipe, and fittings for Edgewood Arsenal, Md., and to convert the same into such sheet lead, lead pipe, etc., and deliver the same as required from time to time at said Edgewood Arsenal at a price based upon the cost to it of the pig lead plus a fixed and agreed conversion charge, and the United States of America, through said Capt. R. M. Clucas, promised and agreed to purchase from claimant sheet lead, lead pipe, and fittings containing lead equivalent in amount to that so allocated to and paid for by it.

DECISION AND DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement, together with certificate C, to Claims Board, Chemical Warfare Service, for action in the manner provided in specification (c), section 5, Supply Circular 17, Purchase, Storage and Traffic Division.

Col. Delafield and Lieut. Col. Junkin concurring.

Case No. 2047.

In re **CLAIM OF EASTERN MALLEABLE IRON CO.**

- 1. ARBITRATION LABOR DISPUTES.**—Where claimant agreed to submit labor disputes to the National War Labor Board and submit to its finding, labor also agreeing to the same, and the National War Labor Board renders a decision granting an increase in wages, and claimant pays the increase according to such decision, there is no agreement on the part of the Government to reimburse claimant for wages so paid.
- 2. RECOMMENDATION NATIONAL WAR LABOR BOARD TO REIMBURSE CONTRACTORS FOR INCREASED LABOR COST.**—In the absence of an express agreement in the arbitration agreement requiring such reimbursement, and in the absence of a labor clause in the original contract, such recommendation does not impose any liability on the Government.
- 3. CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$2,428.99 for increased wages paid by reason of a decision of the National War Labor Board. Held, claimant is not entitled to recover.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF THE FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, of 1919, for \$2,428.99, by reason of an agreement alleged to have been entered into between the claimant and the United States. The claimant's petition was filed with the Bridgeport District Claims Board prior to June 19, 1919, and by said board referred to this Board.

2. The case was heard on December 2, 3, 4, and 22, 1919, together with 74 other cases involving similar questions, as follows:

Locomotive Co. of America.....	Nos. 607, 1181, and 2005.
Bryant Electric Co.....	Nos. 1204, 1465, 1466, 1849, 1850, 1997, 1998, 2030, 2032, 2045, 2178, 2409, and 2410.
Connecticut Electric Co.....	Nos. 1521 and 1999.
Bilton Machine Tool Co.....	Nos. 1547, 1748, 1974, 1985, 2034, 2035, and 2041.
Bridgeport Brass Co.....	Nos. 564, 1256, 1257, 1993, and 2057.
Eastern Malleable Iron Co.....	Nos. 1500, 2047, 2056, 2206, and 2217.
Bridgeport Hardware Mfg. Co.....	Nos. 1776, 1992, 2172, and 2408.
Nilson Machine Co.....	Nos. 1631 and 2050.

H. E. Harris Eng. Co.....	Nos. 1495, 2043, 2051, and 2055.
Bridgeport Chain Co.....	Nos. 1637, 2023, 2048, 2068, and 2085.
Coulter & McKenzie Machine Co.....	No. 1990.
Carpenter Manufacturing Co.....	No. 1996.
Electric Cable Co.....	No. 2229.
Electric Compositor Co.....	No. 2086.
Feeny Tool Co.....	Nos. 2031 and 2049.
International Silver Co.....	No. 2003.
Lindstrom Die Tool & Gauge Works.....	No. 2004.
Modern Manufacturing Co.....	No. 2002.
Precision Gauge & Tool Co.....	No. 2084.
Raybestos Co.....	Nos. 2054 and 2053.
Sprague Meter Co.....	No. 2006.
A. P. Swoyer Co.....	No. 2167.
Holmes & Edwards Silver Co.....	Nos. 637 and 573.
American Tube & Stamping Co.....	Nos. 1979, 1977, and 2044.
Anderson Die Machine Co.....	No. 1978.
Automatic Machine Co.....	Nos. 1680 and 1973.
Black Rock Manufacturing Co.....	Nos. 2036 and 2052.
Bradley Machine Co.....	No. 1972.
Fred G. Breul.....	No. 1971.
Bridgeport Cutters Works.....	No. 2037.
Bridgeport Deoxidized Bronze & Metal Co.....	No. 1994.
Bridgeport Die & Machine Co.....	No. 1995.
Bridgeport Metal Goods Mfg Co.....	No. 2072.

3. The claimant, under date of March 13, 1918, entered into a formal written contract with the Government whereby the claimant agreed to manufacture 500,000 malleable body castings.

In the period between March 13, 1918, and the armistice, November 11, 1918, the claimant was operating its plant at Bridgeport, Conn., and employing workmen in the performance of its contract.

4. During the war the city of Bridgeport and its environs, known as the "Bridgeport District," contained many important manufacturing concerns, producing material and supplies essential to the conduct of the war. In the spring of 1918 evidences of discontent among the workmen began to appear. In February, the machinists employed at the Remington Arms Union Metallic Cartridge Co. (hereinafter called the Remington Arms Co.) made a demand for increased pay. This was referred by the company to the Ordnance Department in consequence of the terms of its contracts which forbade increase of wages except on consent of the department. The first open break came between May 3 and 8, by strikes of toolmakers and machinists at the plants of the Remington Arms Co., the Liberty Ordnance Co., and about 20 smaller shops of subcontractors making supplies for Government contractors.

5. The strike involved a comparatively small number of men, perhaps 5,000, but was called at what were designated at the hearing as

"key points"—that is, vital points in war industry—and gave promise of spreading to large proportions.

6. The Ordnance Department sent to Bridgeport Maj. William C. Rogers, who induced the strikers to return pending an investigation of wages and cost of living by the mediation branch of the Industrial Service Section of the department, known as the "Rogers Board."

7. The Rogers Board held a hearing on May 23, 1918. There were represented at the hearing the Remington Arms Co., the International Association of Machinists, and the Bridgeport Manufacturers' Association, and others whose names do not appear in the minutes of the Board.

8. The Bridgeport Manufacturers' Association was represented by Clarence E. Bilton, its president, and president of the Bilton Machine Tool Co. (a claimant in one of the cases before this Board); George M. Eames, of the Singer Manufacturing Co.; W. R. Webster, of the Bridgeport Brass Co. (a claimant); J. C. Stanley, of the American-British Co.; J. H. Collier, of the Crane Co., and George S. Hawley, counsel and general manager of the association, and subsequently counsel for the claimants now before this Board.

9. The association is an incorporated body in which many of the Bridgeport manufacturers are members. It played a useful part in representing the interests and expressing the views of Bridgeport manufacturers at the hearing before the Rogers Board and subsequently in negotiations with the War Department, while disclaiming all authority to impose a corresponding responsibility upon individual manufacturers by so doing.

10. The manufacturers' association objected particularly to the classification of employees and to the fixing of a minimum wage for classes. It submitted a statement through its counsel, Mr. Hawley, in part as follows:

"We appear before your honorable board without prejudice by special invitation because we understand that a minimum wage is to be fixed for Bridgeport; and while we claim that we would not be bound by any decision, nevertheless we feel that it will vitally and unfavorably, if not disastrously, affect Bridgeport generally in its manufacturing interests, not only from the standpoint of the individual manufacturers, but also from the standpoint of the Government as to production, strikes, etc., and therefore we desire to present our views on the subject. We can not too strongly urge our firm belief that such action will at least result in great unrest among the workers in all lines of work, in increased turnover and lessened production. * * * It is now proposed, as we understand, to fix a minimum wage in Bridgeport for at least toolmakers and machinists, perhaps including some other branches, and that a minimum will be fixed in other sections of the country later until the entire country shall be placed under the same policy. May we therefore take up for

a moment the question of minimum wage? * * * The demand of the union is 'First, that a minimum rate per hour of 80 cents be established for all toolmakers, die makers, gauge makers, and the men working on jigs and fixtures. * * * Second, that a minimum rate per hour of 70 cents be established for all machinists, specialists, operators, and bench hands. * * * It will be seen that the demand is that practically all, if not all, of those working in a tool room shall receive the benefit of the minimum; and that all machinists, even operators and bench hands who have been brought in from the street and taught within a short time to do certain work, shall receive the benefit of the minimum.'

The association further alleged that the system suggested would not only be "not practicable but ruinous."

11. After investigation by its agents the Board on June 7, 1918, made public an award in which it classified employees and fixed minimum wages for the different classes.

12. Bridgeport manufacturers, other than the Remington Arms, the Liberty Ordnance, and the 20 small contract shops, claimed that the award did not in any way apply to them. On the other hand, employees of these same manufacturers claimed that the award was intended to cover the wage situation in general in Bridgeport. In particular a demand was made upon the American-British Manufacturing Co., whose representative, Mr. J. C. Stanley, had been present at the hearing before the Rogers Board.

13. The manufacturers resisted the demand that the Rogers award be put into force throughout the city. Union officials insisted that this should be done. Serious trouble impended. The union threatened to tie up the entire city.

14. A group of manufacturers requested a conference with William Stanley King, special assistant to the Secretary of War. Accordingly, on June 23, 1918, Mr. King and Dr. E. M. Hopkins, who was about to succeed Mr. King as special assistant to the Secretary, met Mr. Bilton; Mr. E. Kent Hubbard, president of the Connecticut Manufacturers' Association; Mr. Lewis G. Kibbe, of the Stamford Rolling Mills; Mr. C. C. Tyler, of the Remington Arms Co.; Mr. John Goss, of the Scoville Manufacturing Co., of Waterbury; and Mr. Hawley, counsel and manager of the Bridgeport Manufacturers' Association.

15. The morning was taken up by a presentation by the manufacturers to Messrs. King and Hopkins of the reasons why they felt that the Rogers award was, as they stated, unwise, unfair, and an incorrect method of dealing with the industrial situation in Bridgeport. Their principal objections were that the technique of the Rogers Board in reaching the award had been incorrect; that there had been misunderstanding as to its terms and that the rulings of the Board on

the questions of classification were impractical, unfair, and impossible of application.

16. Mr. King replied to the manufacturers that the award having been made by a duly authorized Government Board, failure to put it into effect would result in serious interruption to production in Bridgeport unless some other method of handling the difficulty was provided. The War Labor Board was then suggested by one side or the other as a tribunal to deal with the matter. The manufacturers stated that they would prefer an adjudication by this Board to an attempt to enforce the Rogers award.

17. When the conference ended it was mutually understood that Mr. King was to recommend to the Secretary of War the setting aside of the Rogers award and reference of the controversy to the War Labor Board and that the manufacturers present should submit the controversy to the War Labor Board and abide by its decision; and that the submission was to be in proper form so that there could be no subsequent question as to whether there had been a submission or not. It was mutually expected that other Bridgeport manufacturers not represented at the meeting would take similar action.

18. The next day, June 24, the Secretary of War referred the matter to the War Labor Board in the following communication:

JUNE 24, 1918.

HON. WILLIAM H. TAFT and HON. FRANK P. WALSH,
Joint Chairmen War Labor Board, Washington.

DEAR SIRS: I beg to formally refer to you a controversy which has arisen between certain manufacturers of munitions in Bridgeport, Conn., and their employees, which because of the importance of the plants to our program and because of the far-reaching effect that any decision made will have upon the prompt delivery of our munitions deserves your early and your most careful consideration.

The policy of the War Department, as you know, is so far as possible to determine by boards which it has set up or by its mediation service controversies which may arise in the production of its program of munitions. This particular controversy, however, is, in my opinion, of such importance as to justify, if not demand, reference to the War Labor Board as the final court of appeal appointed by the President.

Such a course is made particularly wise because your board now has under advisement somewhat similar problems presented in two other large munitions centers.

The essential facts are as follows:

1. In the early spring of this year demands from certain of their skilled employees were made upon the Remington Arms Co., of Bridgeport, Conn. The company is under contracts with this department which do not permit of a general wage increase in its plant except with previous approval of the contracting officer. Similar demands were subsequently made on the Liberty Ordnance Co., of Bridgeport, and on a number of subcontractors of these two concerns.

2. The Ordnance Department, at the request of the Department of Labor, and of at least one of the parties to the dispute, offered its mediation services, and as a result a board of officers was detailed to hold a hearing in Washington. A report of this hearing is inclosed.

3. There was no written agreement by the parties to abide by the decision of the board. The question as to what verbal agreement, if any, exists is in dispute, as well as the question as to the number of employers parties to the controversy.

4. A finding was made by the Ordnance Board, which up to the present time has not been fully accepted by either party. The employees have received it under protest; the employers, except the Remington and a few others deny that they are parties to the controversy; the Remington has taken an appeal from the finding of the Ordnance Board under the labor-disputes clause in their contract, a copy of which is enclosed.

5. Evidence has been submitted to me that an implied understanding exists with the machinists and toolmakers in the plants of the Remington Arms and the Liberty Ordnance, that such award as may finally be made should date from May 1st; and that an understanding exists with the machinists and toolmakers in plants of sub-contractors operating on fixed-price contracts that the award should take effect from the date it is rendered.

In view of these facts and under the power conferred on me under the contract with the Remington Arms Co., I have directed the Chief of Ordnance to set aside the finding of the Board of Ordnance officers; to instruct the Bridgeport contractors of the Ordnance Department that the finding is not to be made effective; and I beg to refer to your board the entire question of what, if any, readjustment of wage scale in Bridgeport and vicinity should be made in justice to the employees and having due regard to the proper interests of their employers and having, of course, in mind the vital interests of the Government. The decision of your board will be made effective by me under the clause in the contract referred to in plants having such contract provisions with this department.

Cordially yours,

NEWTON D. BAKER.
Secretary of War.

The Navy Department concurs in above.

(Signed) F. D. ROOSEVELT.
Acting Secretary of the Navy.

19. Mr. Hawley testified at the hearing that prior to June 27, 1918, he did not represent any of the claimants in the present cases. On that day, he stated, he began to represent them. In a telephone conversation with Mr. King he reported that certain of them would assent. From time to time between that day and July 1 other claimants, through him, indicated their willingness to assent. Under date of July 1 all claimants signed the consent hereinafter set out, except two.

20. On the same day the Secretary of War telegraphed to the secretary of the local machinists' union at Bridgeport that he had

decided to refer "the whole problem for review to the War Labor Board, commonly known as Taft-Walsh Board, established by the President as a supreme tribunal for final adjustment of labor disputes."

21. On the same date the Ordnance Department was advised by the Secretary that he had decided that it was advisable "to withhold making this (Rogers) award effective until opportunity shall have been given for a thorough review of its provisions."

22. The result of the action of the Secretary in setting aside the Rogers award was a strike. On June 25 the Secretary telegraphed again to Mr. Smith, representing in strong terms the duty of the men to remain at work. The men returned to work and trouble was averted.

23. On Thursday, June 27, and succeeding days, Mr. King had several conversations with Mr. Hawley, which may be summed up in Mr. King's words as follows:

"Mr. KING. I told Mr. Hawley that the recommendation which I made to the Secretary of War in accordance with our program of Sunday had met with the approval of the Secretary of War and had been carried into effect, and that the official reference to the War Labor Board had been made. I told Mr. Hawley that it was necessary, to secure an adjustment of the present difficulties, that the Bridgeport situation in general should be dealt with by the War Labor Board; that it would not cure the difficulty in Bridgeport if the War Labor Board dealt with an industrial dispute, a plant, or a particular contractor, or two or three contractors, but that it was necessary to secure a submission in Bridgeport, to secure a submission of the general industrial controversy between the metal trades and other trades and the contractors to the Government. I told Mr. Hawley it was essential, in my opinion, to the solution of the problem, that each contractor should submit his case to the War Labor Board; that even the contractor where there was as yet no present strike, or no present overt break in the relations, should submit his case; that any other course would merely mean the settlement of a dispute in the particular plant and the employees would cause one strike to be called after another, that there would be a running sore in the labor situation in Bridgeport if the War Labor Board dealt with one concern or two or three concerns, and did not deal with the others; that the need for supplies at Bridgeport was such that we must have a cessation of strikes at that point, and that that could only be secured by everybody who was a contractor in these lines submitting to the War Labor Board for a general decision in the case.

"I can not tell you in detail what Mr. Hawley said. It was clear to me that he understood my point and that he was going to convey what I had said to the Bridgeport manufacturers who were in the situation.

"On Wednesday I asked Mr. Hawley if the Bridgeport manufacturers agreed to submit their cases to the War Labor Board. Mr. Hawley told me that he had seen some of them and that they would

submit on condition that they got compensation for any increased outlay in wages which resulted from a decision. I told him that there could not be any strings on their submission; that I wanted to know whether they submitted without condition. He told me on Wednesday that certain concerns whom he recited, but whose names I do not now recall, would submit in accordance with my request, and that there was no string to their submission, but they expected confidently compensation. He told me that the Locomobile Company insisted upon compensation as a condition precedent to their submission. He asked me not to give the names of the concerns at that time to the War Labor Board, on the ground that he had not yet been able to confer with all the concerns involved, and that it would be invidious to have the names of those who had already agreed given publicity before the remainder had had an opportunity to consider the question."

24. Mr. Hawley was to get in touch as promptly as possible with the other manufacturers whom he had not seen, and Mr. King told Mr. Hawley that it was of prime importance that the other manufacturers should agree to submit without condition.

25. Mr. King, in his dealings with manufacturers in relation to the submission of the matter to the War Labor Board, did not make any distinction between those who had so-called "labor-dispute" clauses in their contracts and those who had not such clauses. In his opinion the situation was so grave from the standpoint of the Government that it was necessary that a group of manufacturers large enough to be controlling of the city should submit.

26. It was in evidence that on June 28, 1918, the American Tube & Stamping Co. sent the following telegram:

JUNE 28, 1918.

SECRETARY OF WAR,

Attention of Stanley C. King, Washington, D. C.:

We agree to abide by the unanimous decision of the Taft-Walsh Board regarding wage adjustment of certain of our employees. We expect to be compensated by the Government for any increased cost as the result of award and that award to be effective on the date on which the request of our employees was presented.

THE AMERICAN TUBE & STAMPING CO.

It was in evidence that the Bridgeport Brass Co. sent the following telegram:

JUNE 28TH, 1918.

SECRETARY OF WAR,

Attention of Stanley C. King, Washington, D. C.:

We will accept the unanimous decision of the Taft-Walsh Board in reference to wages of several of our employees and we expect that we will be compensated by the Government for the increase cost and that award will not date back to the date on which our employees presented their request.

BRIDGEPORT BRASS COMPANY.

Also the following telegram:

JUNE 28TH, 1918.

SECRETARY OF WAR,

Attention of Stanley C. King, Washington, D. C.

We will accept the unanimous decision of the Taft-Walsh Board Board affecting our employees. As all of our contracts are on a fixed-price basis and some with prewar dates, we must insist upon increase compensation covering any increase granted.

AMERICAN & BRITISH MFG. Co.,
HERBERT F. L. ALLEN, Sec.

27. On June 30, 1918, there was a conference at Stockbridge, Mass., between Mr. Loyall A. Osborne, Mr. George S. Hawley, Mr. W. D. Bryant, and Mr. Walter Drew. At the same time other manufacturers were holding a meeting in Bridgeport. At the meeting with Mr. Osborne the question of reimbursement was again brought forward. Mr. Osborne stated that the Board could not promise reimbursement, but that they would recommend it and that undoubtedly reimbursement would be made because the Government would take great heed to a recommendation of the War Labor Board. He further said that no condition as to reimbursement could appear in the agreement to submit to arbitration, but the most that could be done was to place in the submission a statement that the manufacturers proposed to offer evidence in individual cases as to what effect such an award would have.

28. On July 1 all the manufacturers met to discuss the matter as to whether they would submit to arbitration by the War Labor Board.

29. The agreement to submit to the arbitration was drafted in three forms, all substantially the same but different in minor points, as follows:

"BRIDGEPORT, CONN., *July 1st, 1918.*

"The undersigned, being the contract shops, so called, or jobbers, who became involved in the wage controversy about May 1st, 1918 (or, 2, the undersigned manufacturers not being party to any agreement but whose employees in whole or in part were involved in the recent strike) (or, 3, we, the undersigned manufacturers, not parties to any agreement and not being involved in any strike or unadjusted demands, realize the importance of this matter and) hereby consent to submit the question of wages in our establishment, applying to all classes of labor, to be settled by the unanimous action of this section of the War Labor Board sitting as a board of arbitration. We propose to submit evidence in our individual cases as to how any wage increase will affect our business, but after you have taken all the evidence and completed your investigation on this subject we then will abide by your decision arrived at in accordance with the established procedure of the National War Labor Board."

30. All the claimants in the cases above listed signed one or the other of the above three forms, except the International Silver Co.

and A. P. Swoger Co., and according to the statement of their counsel at the hearing before the Board, the latter two assented, at least orally. The assents were forwarded to the National War Labor Board.

31. The Remington Arms Co. also signed a written agreement to submit, which they filed with the Board, as did the Liberty Ordnance Co., which latter made their submission subject to the approval of the Chief of Ordnance.

32. Agreements to submit to arbitration were also signed and filed with the War Labor Board by representatives of the workmen and of labor unions.

33. The National War Labor Board was appointed by the President under proclamation dated April 8, 1918. It consisted of 12 members, 5 members appointed to represent the employers, 5 members appointed to represent labor, and 2 joint chairmen, Hon. William H. Taft and Hon. Frank P. Walsh. Its powers in general were stated as follows:

"The powers, functions, and duties of the National War Labor Board shall be to settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the effective conduct of the war, or in other fields of national activity, delays, and obstructions in which might, in the opinion of the National Board, affect detrimentally such production; to provide, by direct appointment, or otherwise, for committees or boards to sit in various parts of the country where controversies arise and secure settlement by local mediation and conciliation; and to summon the parties to controversies for hearing and action by the National Board in event of failure to secure settlement by mediation and conciliation."

It provided—

"where an employer and employees both desire to submit a controversy to the Board they shall sign a short joint statement of the issue between them with their respective post-office addresses and request the action of the Board. They shall deliver this signed statement to the secretary."

It also provided:

" ARBITRATION.

"When the Board, after due effort of its own, through sections, local committees, or otherwise, finds it impossible to settle a controversy, the Board shall then sit as a board of arbitration, decide the controversy, and make an award, if it can reach a unanimous conclusion. If it can not do this, then it shall select an umpire, as provided, who shall sit with the Board, review the issues, and render his award."

" ORGANIZATION OF THE BOARD FOR HEARINGS AND ADJUSTMENT.

"Two members of the Board, one from the employers' side and one from the employees' side, shall be appointed to act for the Board in

respect to every local controversy, the members to be named by the joint chairman at the instance of the respective groups of the board. These members shall be called a section of the Board, and shall hear and adjust cases assigned to them. If they can not effect any adjustment, they shall summarize and analyze the facts and present the same to the Board with their recommendations.

"The National Board may appoint permanent local committees in any city or district to act in cases therein arising.

"In the selection of such local committees, recommendations will be received by the National Board from associations of employers and from the central labor body of the city or district and other properly interested groups. Sections of the Board are authorized to appoint temporary local committees where permanent local committees have not been appointed by the board."

34. The National War Labor Board had appointed as a section to deal with the Bridgeport situation Messrs. Taft and Walsh, chairmen, Mr. Loyall A. Osborne, and Mr. William H. Johnston. The section arrived in Bridgeport on July 1, 1918, and proceeded with its investigation. It held hearings and received evidence and arguments from the manufacturers and from the laborers. As the Board was unable to come to a decision on certain points, Mr. Otto M. Eidlitz was agreed upon as umpire to pass upon disputed questions. After his findings the Board issued a unanimous award under date of August 28, 1918. The provisions of this award were put into effect by the claimants and other Bridgeport manufacturers. Under paragraph 4 of the award it appeared that there was an increase in the rate of wages to be paid by the claimants in the several cases to their employees over the rates in existence prior to the Rogers award. No sufficient evidence was offered, however, to show whether the rates awarded by the War Labor Board were on the whole greater or less than the rates which the Rogers Board had granted. The award was made retroactive as to certain manufacturers from May 1, 1918, as to others from June 6, 1918, and as to others from July 1, 1918.

35. On November 2, 1918, Mr. King sent the following memorandum to W. J. Lauck, secretary National War Labor Board:

NOVEMBER 2, 1918.

Memorandum for Mr. W. Jett Lauck, secretary National War Labor Board.

1. The manufacturers concerned in the Bridgeport award have made request of the War Department for reimbursement to the extent of the increase made by the umpire in the Bridgeport award.

2. The Secretary of War, when he addressed a letter to Messrs. Taft and Walsh, joint chairmen of the National War Labor Board, requested them to intervene and take jurisdiction of the cases under the labor-disputes clause, and stated that he would make effective the decision of the National War Labor Board under the power conferred

upon him by the labor-disputes clause in the Remington Arms Company and the Liberty Ordnance Company and any other such companies whose contracts contained such clause.

3. Under the labor-disputes clause the contractors are entitled to such reimbursement; provided, however, that the Secretary of War or his representatives (in this case the National War Labor Board) shall direct in writing that such reimbursement be made.

4. May I ask you to submit to the umpire or to the War Labor Board the question whether in these cases reimbursement should properly be made by the War Department?

(Signed)

STANLEY KING,
Private Secretary.

On December 11, 1918, the National War Labor Board replied as follows:

NATIONAL WAR LABOR BOARD,
Washington, December 11, 1918.

DEAR SIR: Answering the annexed inquiry under date of December 11, we beg leave to advise that we are unable to find that Mr. Stanley King was given any further reply as per your question 3.

For your information I wish to advise that on November 8 this Board took the following action:

Docket No. 132. Machinists, Bridgeport, Conn., *v* Bridgeport.

The Secretary read a letter, dated November 2d, he had received from the War Department in reference to correspondence attached thereto, in respect to the request of manufactures concerned in the Bridgeport award for financial aid from the War Department to the extent of the increase made by the umpire in the award, and asking that this question of reimbursement be placed before the National War Labor Board or the umpire in the case for a decision as to whether such reimbursement should properly be made by the War Department.

After discussion it was moved, seconded, and carried:

"That we recommend to the Secretary of War that he reimburse the manufacturers to such amount as after investigation he shall deem proper."

Very truly, yours,

(Signed)

W. JETT LAUCK,
Secretary.

A: H.

Major SAMUEL J. ROSENHOHN,
Room 161, State, War, and Navy Building,
Washington, D. C.

36. The petitioners in the several cases claim that the Government is under obligation to reimburse them for expense to which they have been put, if any, by reason of the rate of wages fixed by the National War Labor Board as aforesaid.

DECISION.

1. Events leading up to and circumstances surrounding the dealing of the Government and the claimants, upon which these claims

are founded, have been testified to very fully by witnesses for both sides.

2. The Rogers Board came to Bridgeport to deal with labor troubles in a limited group of establishments, none of which belonged to the claimants in the present cases.

3. Their award was made public on June 8, 1918. It was the result of an investigation which included hearings in which the Bridgeport Manufacturers' Association and officers of certain of the claimants had taken prominent part. In the course of the hearings it had been stated by Mr. Hawley, then counsel for the association, and now counsel for all the claimants, that it was proposed "as we understand, to fix a minimum wage in Bridgeport for at least tool-makers and machinists, perhaps including other branches."

4. It is evident that no one understood better than the manufacturers' association that the effect of an award along the lines asked by the machinists' union would, as a practical matter, extend beyond the shops of contractors and subcontractors directly concerned.

5. It was not unnatural, therefore, that after the publication of the award the union leaders, who had listened to the discussions before the Board, should assume that the terms of the award should be applied throughout the city. At any rate, such was their assumption and demand.

6. On the other hand, the large majority of manufacturers had not been parties to the proceedings before the Board and were not legally or morally bound by the judgment of the Board.

7. As a practical matter, however, manufacturers in Bridgeport were faced with the disagreeable alternative of putting into effect the principles laid down by the Rogers Board, to which they strongly objected—that is, classification of employees and a general advance in wages—or being involved in a strike of serious proportions.

8. Classification of employees was stated by Mr. Hawley, at his conference with Mr. King, to be "impractical, unfair, and impossible of application." Failure to put the award into effect would doubtless lead, as stated at the time by Mr. King, to serious industrial trouble and interruption in production. That his prophecy would have been fulfilled is evidenced by the fact that upon the setting aside of the award, even though accompanied by reference to the "Supreme tribunal for final adjustment of labor disputes," a strike actually occurred and was discontinued only upon the strongly worded appeal to patriotism by the Secretary of War.

9. It goes without saying that the Government was interested equally with manufacturers in preventing a serious interruption in production.

10. Matters being in the above situation, certain manufacturers met at Bridgeport in the week of June 16 and decided to appeal to the

Secretary of War through his representative, Mr. King. In response to request Mr. King met a group of manufacturers on Sunday, June 23.

11. The conference resulted in convincing Mr. King that it was desirable to set aside the Rogers award if another method could be devised of settling the questions at issue.

12. Reference to the National War Labor Board having been suggested, Mr. King explained that if the matter were to be laid before this Board a repetition of the then existing difficulties must be avoided and, to that end, a sufficient number of manufacturers to control the city must agree to be bound by any award the Board should make.

13. The result of the meeting was that Mr. King agreed to recommend to the Secretary of War the setting aside of the Rogers award and the referring of the matter to the National War Labor Board on the understanding that the manufacturers present and a sufficient number of others should join in an agreement to submit the matter to this arbitration, thus giving practical assurance that the proceeding would adjust existing labor troubles and enable production to continue. This course was apparently agreeable to all at the meeting.

14. The next day the Secretary of War set aside the Rogers award and referred the matter to the National War Labor Board.

15. After the conference Mr. Hawley and his associates returned to Bridgeport. On Thursday of the same week Mr. Hawley notified Mr. King that certain of the manufacturers had agreed to assent to arbitration. In this and other conferences he endeavored to have made a part of the agreement of arbitration a provision that the manufacturers should be reimbursed any expense to which they might be put. This was definitely refused by Mr. King, who stated to Mr. Hawley that his clients must submit to arbitration without condition.

16. In the next few days there were further negotiations with Mr. Hawley, who by this time had become attorney for all the claimants, and conferences among the manufacturers. Finally, on July 1, 1918, an instrument was drafted and signed by the claimants (with the exception of two who apparently assented orally) whereby they agree to submit—

“the question of wages in our establishment, applying to all classes of labor, to be settled by the unanimous action of the section of the War Labor Board sitting as a board of arbitration * * *

and “abide by your decision.”

17. Representatives of the laborers also assented to the arbitration proceedings.

18. The Board met and, after hearings, issued a unanimous decision. This award was complied with by both the manufacturers and employees, and production proceeded without interruption.

19. The claimants now urge that out of the facts a promise on the part of the Government to reimburse them added expense, which they allege they have incurred by reason of the provisions of the National Labor Board's award, is to be found.

20. There is nowhere in the voluminous record of the case evidence of an express promise on the part of any agent of the Government to make reimbursement.

21. It is not claimed that any express promise came from Mr. King.

22. The claimants have introduced evidence of a conference held at Stockbridge, Mass., on June 30, between certain manufacturers, Mr. Hawley and Mr. Loyall A. Osborne. Mr. Osborne stated that the Board could not promise reimbursement, but would recommend it.

23. The War Labor Board was not a nonpartisan tribunal. It was a bipartisan tribunal of two groups representing opposite interests. Its decisions had to be unanimous. Mr. Osborne was one of the employers' representatives on the Board. It is obvious that so far as his statements purported to be a promise of the Board, they were beyond the power of Mr. Osborne to make, and could not bind the Board, much less the Government. At most, however, he did not promise reimbursement but only a recommendation to some other authority. The effect of this statement was once again to put the manufacturers on notice that the Government was not promising reimbursement.

24. Nor do we find a promise to be implied from the acts of the parties, and all the circumstances. It is true that on several occasions and in several ways, the claimants, both through their counsel, and, some of them, directly by telegram, requested and assiduously urged a provision for reimbursement. The request was definitely refused by Mr. King. And the final upshot of the matter was that the claimants executed the arbitration agreement without condition.

25. One theory of claimants' counsel is, if we understand it correctly, that Mr. King, while refusing to have a provision for reimbursement made a part of the arbitration agreement, yet impliedly promised reimbursement as a consideration for their signing an agreement without provision for reimbursement. This contention is ingenious, but not convincing, and we do not find it supported by the facts.

26. In support of their contentions the claimants have cited *U. S. v. Buffalo Pitts Co.*, 234 U. S. 228; *U. S. v. Russell*, 13 Wallace, 623; *U. S. v. Newport News Shipbuilding Co.*, 178 Federal, 194; *U. S. v.*

Berdan Fire Arms Co., 156 U. S. 552; *U. S. v. Palmer*, 128 U. S. 262; *U. S. v. Barlow*, 184 U. S. 123. In all of these cases the Government received services or property, or the use of property, under such circumstances that the court found that it must have been understood both by the Government and by the other parties to the suits that the services were not to be rendered gratuitously or the property to be taken without compensation. The present case is not similar.

27. "Services" in the common acceptance of the term have not been rendered in the present cases. Where a party to a contract under which he is to receive manufactured articles, urges the other party to arbitrate labor difficulties so that production of the articles may not be interrupted, and the other party may continue to carry out his contract, the usual implication that payment is to be made for services rendered on request, does not arise. But more than this, an agreement to pay is not to be implied except under such circumstances as indicate that both parties expected payment to be made (*Coleman v. U. S.*, 152 U. S. 96; *Harley v. U. S.*, 198 U. S. 229, and cases *supra*) and an explicit refusal beforehand to agree to payment, negatives an implication that the one party promised to make payment, and that the other could reasonably expect it. (*Shannon Copper Co.*, No. 606, Board of Contract Adjustment, December, 1919.)

28. Counsel have laid emphasis on alleged statements of Mr. King that all manufacturers "must" submit without condition. They further call attention to the knowledge of the claimants of the great powers of the Government, indicating its powers under the national defense act. At the same time counsel expressly disclaimed at the trial any claim that the Government had exercised duress in the matter, or that there had been compulsory proceedings or threats of any kind. They further took pains to deny that the action of the Government had been in any way under the compulsory sections of the national defense act. Mr. King did not substantiate the testimony of the claimants' witnesses as to his use of the word "must," but, if used, it was used when he was bringing to the attention of claimants' counsel denial of reimbursement and the form which submission to arbitration should take. Mr. King may have urged the claimants to submit to arbitration, but he seems to have been extraordinarily restrained so far as any intimation of the possible use of its great powers by the Government is concerned. We do not find that Mr. King used any pressure such as would alter the relations of the parties.

29. In short, we do not find from the words or conduct of Mr. King, or other facts in evidence, an express or implied agreement for reimbursement.

30. Claimants' counsel have strongly urged that the Government in effect directed the claimants to pay an increased scale of wages, thus changing the requirements as to performance of their obligations by the claimants, and so bringing the cases within the principles of *United States v. Barlow* (supra) and *United States v. Newport News Shipbuilding Co.* (supra). In support of their allegations they have attempted to prove that the Government was "almost wholly responsible" for the industrial unrest in Bridgeport in the spring and summer of 1918; that the Government made a "blunder" in the Rogers award; that there was no justification for any wage increase in Bridgeport; that the award of the War Labor Board was "wholly a matter of expediency and not made on the real merits of the case"; and that the Government intervened in a situation which would have corrected itself if the Government officials had remained quietly in Washington.

31. We do not find the allegations supported by the evidence in the case.

32. That the labor situation in Bridgeport in the spring and summer of 1918 was extremely serious is denied by neither the claimants' counsel nor the Government attorney. William H. Johnston, a member of the War Labor Board and president of the machinists' union, whose testimony is quoted in the claimants' brief, characterized the situation as a "revolution brewing."

33. The Rogers award served to allay troubles in the comparatively few shops which it directly affected. If the other Bridgeport manufacturers had seen fit to bow to the force of circumstances and put into effect its terms in their establishments, doubtless all trouble would have been averted. They did not choose to do this.

34. There is ample evidence in the case that arbitration by the National War Labor Board was preferred by Bridgeport manufacturers to the enforcement of the Rogers award.

35. From the point of view of the Government it appeared that contractors generally, in the most important munitions producing district in the country, were about to fail in the performance of their contracts by reason of controversies with their employees. What the Government might have done under the circumstances, by force of the national defense act, or otherwise, is immaterial. What it did do was to get both sides to agree to arbitrate. The result of the conferences between Mr. King, representing the Government on the one hand, and Mr. Hawley, representing the claimants on the other, was a definite and voluntary, albeit reluctant, agreement by the latter to submit the controversy to the arbitration of the National War Labor Board. We find no compulsion exercised upon the claimants, or direction to pay higher wages to their employees.

36. There is no evidence that the War Labor Board made a promise of reimbursement to the claimants. The vote of the Board offered in evidence was a recommendation to the Secretary of War and does not amount to a promise. It related only to the contracts containing express provision for an increase of pay to the contractor in case of increase of the wage scale in his shop, of which the contract of the claimant in the present case was not one.

DISPOSITION.

Final order will issue denying relief to the claimant.
Col. Delafield, Mr. Hunt, and Mr. Montgomery concurring.

Case No. 1979.¹

In re CLAIM OF AMERICAN TUBE & STAMPING CO.

1. **CONSTRUCTION OF CONTRACT—LABOR-DISPUTE CLAUSE.**—Where a contract expressly provides that labor disputes may be submitted to the Secretary of War for settlement and that if such settlement results in a readjustment of wages there should be a readjustment of the price of the manufactured articles, an award by the War Labor Board which resulted in increasing labor costs and its direction that the contractor be reimbursed constitutes such a settlement as was contemplated by the contract, and the contractor is entitled to receive reimbursement of the additional labor costs.
2. **ARBITRATION OF LABOR DISPUTES WHERE NO CONTRACT PROVISION.**—Where claimant in the absence of a contract provision agreed to submit labor disputes to the National War Labor Board and submit to its findings, labor also agreeing to do the same, and the National War Labor Board rendered a decision granting an increase in wages, and claimant paid the increase according to such decision, there is no implied agreement on the part of the Government to reimburse claimant wages so paid.
3. **CLAIM AND DECISION.**—Claim filed under the act of March 2, 1919, and also referred under General Order 103, based upon 15 contracts, 2 of which contained a so-called labor-dispute clause. Held, claimant is entitled to relief only under the two contracts which contained a labor-dispute clause.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim has been brought by the claimant under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, of 1919, for \$10,131.33, by reason of an agreement alleged to have been entered into between the claimant and the United States. It is also before this Board by virtue of a reference by the Bridgeport District Claims Board under General Order 103, War Department, 1918, for the amounts claimed to be due under certain written contracts between the claimant and the United States, hereinafter specifically referred to.

¹ The following claims involving similar questions were heard and same decision and disposition made on them as in the above case: A. P. Swoyer Co., Case No. 2167; Bridgeport Brass Co., Case No. 1993; and Locomobile Co. of America, Case No. 607.

2. The claim was presented before June 30, 1919, to the Bridgeport District Claims Board, and was by said board referred to this Board and received by the latter September 12, 1919.

3. The case was heard with the case of the Eastern Malleable Iron Co., Case No. 2047, and other cases referred to in the opinion in the latter case, on December 2, 3, 4, and 22, 1919. Claimant was represented by counsel.

4. The claimant entered into 15 written agreements with the Government, under different dates, to furnish to the Government certain articles to be manufactured by the claimant. Claimant's contracts were numbered as follows:

P2602-895Tw.	P11353-2875A.	P15611-3727A.
P2604-1378A.	P11488-2908A.	P17275-4201A.
P3603-1668A.	P13540-3336A.	P17480-4240A.
P9525-2031Tw.	P13874-3408A.	G1052-563A.
P11009-2809A.	P15224-3653A.	G1724-956A.

Claimant had also certain procurement orders.

5. Out of the above, only contracts numbered P-15611-3727A and G-1052-563A contained the clause known as the "labor-dispute clause."

The clause in P-15611-3727A read as follows:

ARTICLE XXII. *Adjustment of labor disputes.*—In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries, and the Secretary of War or his representative shall have requested the contractor to submit such disputes for settlement, the contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties hereto agree to accede to and to comply with all the terms of such settlement.

"If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in making such settlement and as a part thereof may direct that a fair and just addition to the contract price shall be made therefor: *Provided, however,* That the Secretary of War or his representative shall certify that the contractor has in all respects lived up to the terms and conditions of the contract or shall waive in writing for this purpose only any breach that may have occurred.

"If such settlement reduces such labor cost to the contractor the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price.

"No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement.

"Every decision or determination made under this article by the Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto.

"NOTE.—Provisions of Article XXII recommended by War Labor Policies Board and prescribed by order of Secretary of War dated August 30, 1918."

The clause in G-1052-503A read as follows:

"ARTICLE XIII. In the event that labor disputes shall arise directly affecting the performance of this contract, and causing, or likely to cause delay in making deliveries upon the date, or dates specified, the contractor shall address a written statement thereof to the Chief of Ordnance for transmission to the Secretary of War, with the request that such dispute be settled, providing such information and access to information within the control of the contractor as the Secretary of War shall require, and it is stipulated and agreed that the Secretary of War may thereupon settle, or cause to be settled, such dispute, and the contractor agrees to accede to and comply with all the terms of such settlement.

"If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this prior contract, to such settlement a fair addition to the contract price of the articles shall be made therefor, but if such settlement reduces the labor costs of the contractor, a fair deduction shall be made from the contract price, all as may be determined by the contracting officer.

"No claim for addition or deduction shall be made unless the same has been ordered in writing."

6. In the year 1918, prior to the armistice, the claimant was engaged in the manufacture of the articles covered by its contracts, in its establishment at Bridgeport, Conn.

7. Except for the foregoing recitals the evidence in the case was the same as in the opinion in the case of the Eastern Malleable Iron Co. The findings of fact are set forth in the opinion in that case, except as herein in this statement of facts and decision modified.

DECISION.

1. We find as a fact in this case that labor disputes arose directly affecting the performance of contracts P-15611-3727A and G-1052-563A, and causing, or likely to cause, delay in making the deliveries under the contracts, and that the Secretary of War, through his representative, requested the contractor (the claimant) to submit such disputes for settlement; that the contractor thereupon did submit such disputes to the Secretary of War for settlement, and provided such information and access to information within the control of the contractor as the Secretary of War required, and that the Secretary of War caused such disputes to be settled by reference thereof to the War Labor Board, and the contractor complied with the terms of the settlement.

2. We further find, if any increase of wages resulted from the decision of the War Labor Board, such increase was ordered in writing by such War Labor Board, acting as the duly authorized

representative of the Secretary of War, and that such addition to the contract price was directed as a part of the settlement, within the meaning of said contracts.

3. For the reasons stated in the opinion in the case of the Eastern Malleable Iron Co., No. 2047, we find that the claimant in this case is not entitled to the relief sought, excepting in connection with contracts P-15611-3727A and G-1052-563A, as specified.

4. As a condition to obtaining the settlement hereinbefore indicated, it will be necessary for the claimant, in order to comply with the proviso contained in Article XXII of P-15611-3727A above quoted, to obtain from the Secretary of War, or his representative, a certificate that the contractor has in all respects lived up to the terms and conditions of the said contract, or a waiver in writing, for the purpose only of this settlement, of any breach that may have occurred.

5. Upon the performance of the above condition, the claimant will be entitled to receive reimbursement for the additional sums (including back wages) it was required to pay for labor cost in connection with said two contracts, by reason of the wage scales set by the War Labor Board award, over and above what it would have paid under the wage scale prevailing in the performance of said contracts immediately prior to such award, to wit, August 28, 1918.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Ordnance Claims Board for appropriate action.

Col. Delafield, Mr. Hunt, and Mr. Montgomery concurring.

Case No. 2407.

In re CLAIM OF BRIDGEPORT HARDWARE MANUFACTURING CO.

1. **CONSTRUCTION OF CONTRACT—LABOR-DISPUTE CLAUSE.**—Where a contract provided that any increase in labor costs should entitle the manufacturer to a readjustment of the price of the manufactured article, and that, in case the parties to the contract could not agree on such re-adjusted price, such price should be fixed by the Board of Arbitration of the War Department, an award of the War Labor Board constituted this readjustment of price within the terms of the contract.
2. **CLAIM AND DECISION.**—Claim filed under the act of March 2, 1919, and also referred under General Order 103, based upon a written contract containing a so-called labor-dispute clause. Held, claimant is entitled to relief.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim has been brought by the claimant under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, of 1919, for \$1,387.22, by reason of an agreement alleged to have been entered into between the claimant and the United States. It is also before this Board by virtue of a reference by the Director of Purchase, dated January 19, 1920, under General Order 103, War Department, 1918, for amounts claimed to be due under a contract between the claimant and the United States, hereinafter specifically referred to.
2. The claim was presented before June 30, 1919, to the Claims Board, office of Director of Purchase, and was by said Board referred to this Board, as aforesaid.
3. By agreement of counsel for the claimant and for the Government, the evidence in this case was stipulated to be the same, except as herein modified, as the evidence in the case of the Eastern Malleable Iron Co., Case No. 2047, heard on December 2, 3, 4, and 22, 1919.
4. The claimant entered into a written agreement with the Government, through the Quartermaster Corps, dated May 20, 1918, and numbered 3332-N, whereby the claimant was to furnish to the Government certain articles to be manufactured by the claimant.

5. A clause in the claimant's contract was as follows:

"8. (b) Any increase in your labor or material costs shall entitle you to a readjustment in the price under this contract to be agreed upon between the parties, or if the parties are unable to agree then such readjusted price shall be fixed by the Board of Arbitration of the War Department. The readjusted price shall automatically apply to deliveries subsequent to June 30, 1918, if the readjustment shall be made on the basis of circumstances occurring on or before that date. But after June 30, 1918, readjustments, if any are necessary, shall be made on the basis of circumstances occurring during each succeeding sixty days for shipments during the sixty days next following the sixty-day period used as a basis of determining the readjusted price. If, during any period in which the question of readjustment is to be determined as above provided, circumstances shall occur entitling the Government to a reduction under subdivision (a) above, then no readjustment on the basis of such period shall be made."

6. In the year 1918, prior to the armistice, the claimant was engaged in the manufacture of the articles covered by its contracts in its establishment at Bridgeport, Conn.

7. Except for the foregoing recitals the evidence in this case is to be taken to be the same as in the case of the Eastern Malleable Iron Co., Case No. 2047.

DECISION.

1. We find that in the present case the War Labor Board was the board of arbitration of the War Department within the meaning of the provisions of section 8, subsection B, of the contract, and that their award, dated August 28, 1918, was a readjustment of the price, fixed in accordance with the terms of that section.

2. The petitioner claims that such readjusted price has effected an increase in its labor cost. It is not considered necessary to take evidence upon that point, as the amount of the increase, if any, will be determined by the board having charge of the settlement.

3. If it shall show that its labor costs have been increased by the award of August 28, 1918, the claimant will become entitled to a readjustment in accordance with the section of the contract quoted above, and to receive payment of the amount to which it may become entitled under such readjustment for increased labor costs.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield, Mr. Hunt, and Mr. Montgomery concurring.

Case No. 2389.

In re CLAIM OF AMERICAN BLOWER CO.

1. **SUSPENSION AND REINSTATEMENT OF CONTRACT—INCREASED COST OF PRODUCTION.**—Where claimant had a formal supplemental contract with the Government which suspended the original contract, and which provided that the Government might reinstate the original contract and that, if reinstated, it was to be performed in accordance with the terms of the original contract, and which further provided that in no event should the claimant receive a greater amount than that provided for in the original contract; and where, during the period of suspension, claimant increased the wages of its labor, and the cost of production to claimant was thereby enhanced and makes claim, after full performance, for the amount of such increase of wages, in the absence of fraud, accident, or mistake, none of which is alleged, and there being no provision for the reimbursement of such increase of wages, the claimant is not entitled to the relief sought.
2. **CLAIM AND DECISION.**—Claim is made for the sum of \$1,947.50 under original and supplemental contract for making Sirroco fans. Held, claimant is not entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Board of Contract Review and Claims Board, Construction Division of the Army, on a claim for \$1,947.50, which sum represents additional expenses incurred in manufacturing Sirroco fans, which were covered by a purchase order or requisition issued November 6, 1918.

2. On November 6, 1918, project No. 212-1, requisition Nos. 24 and 25, was issued to the American Blower Co. for 16 Sirroco fans to be shipped December 15, 1918, to United States constructing officer at the plant of the Holt Manufacturing Co., East Peoria, Ill., at \$1,235 each, total \$19,760.

On January 2, 1919, claimant was requested to, and did, suspend work on the above requisition. On May 5, 1919, a formal, supplemental agreement was entered into between claimant and the Construction Division by C. M. Foster, major, Quartermaster Corps, United States Army, by the terms of which the original requisition was suspended and claimant was to be paid \$9,000 at once and an

additional sum to be later agreed upon, if the requisition was not reinstated. However, if the requisition was later reinstated the \$9,000 was to apply on the original contract price, viz, \$19,760.

Pertinent articles of this supplemental agreement are as follows:

"ARTICLE I. The existing rights and obligations of the parties hereto under the original contract shall remain in full force and effect except as herein expressly provided.

"ARTICLE II. The contractor agrees that, unless the original contract shall hereafter be reinstated in whole or in part by the United States and he is notified thereof in writing by the contracting officer, or other officer duly authorized by the Secretary of War, he will not perform any further work or services, or incur any further expense or obligations in connection with the performance of the uncompleted portion of said original contract, use his best efforts in every proper way to reduce such liabilities or obligations as have already been incurred in connection with such performance, and in the event said original contract is not reinstated as hereinabove provided, the contractor hereby, and for all time, waives all claim to the prospective profits which he might have made from the performance of the uncompleted portion of said original contract.

"ARTICLE VI. * * * That in no event shall the aggregate payments made or to be made under this supplementary agreement and under the original contract exceed the amounts which would have been payable under the original contract if the said contract had been fully performed * * *."

3. On July 29, 1919 a supplementary order to requisition Nos. 24 and 25 was issued by the Construction Division, reinstating the original requisition, it being as follows:

"You are hereby authorized to reinstate requisition Nos. 24 and 25, dated Nov. 6, 1918, and complete the sixteen (16) fans as originally ordered, but await revised shipping instructions.

"Price each, \$1,235.00; total, \$19,760.00.

"NOTE.—Partial payment of \$9,000.00 on account of this contract having been made under terms of supplemental authorization Nos. 24 and 25A, the balance payable on contract is \$10,760.00."

4. Shortly after receipt of this supplemental order reinstating the original requisition, claimant gave notice to the Construction Division that the wages of labor had advanced between the dates of suspension and reinstatement of the requisition, and that it would expect to be reimbursed the increased cost incident to completing the requisition. The increased cost was at first estimated at \$2,900. On July 1, 1919, the wages of sheet-metal workers had advanced from 75 cents per hour to \$1 per hour, and the wages of helpers had advanced from 50 cents per hour to 72½ cents per hour. Claimant was notified by the Construction Division that its claim for increased pay could not be given favorable consideration. On October 16

claimant wrote the Chief of Construction Division, Peoria Ordnance, in part, as follows:

"It is noted that authorization giving shipping instructions stated that the material is to be billed in accordance with the original authorization dated November 15, 1918. If the Government insists that the material be furnished without any additional compensation to this company, *it will be furnished on that basis*; but we wish to state that we believe that any such action on the part of the Government is entirely unfair and does not take into consideration the increase in wages, over which we have absolutely no control. These wages were increased on June 1st by the labor organization and were compulsory upon us. Even though the supplemental agreement which is dated on May 5th should be interpreted as the Construction Division has interpreted it, we are still of the opinion that we should be allowed extra compensation to cover the increased labor charges. We would therefore appreciate a definite statement from you that the Government will not consider compensating us for the additional charge involved in the labor only."

Claimant's first estimate of \$2,900 as the additional cost it would be put to in filling the requisition after it had been reinstated was reduced to \$1,947.50, which sum represents the amount actually paid its subcontractor, W. L. Bronaugh, Chicago, Ill., who did the sheet-metal work.

5. The original requisition makes no provision for reimbursement to the contractor in the event of an increase in wages of labor during the time the articles were being manufactured under the contract. At no time was the contractor promised by any representative of the Construction Division that it would be reimbursed for the increased wages paid labor in manufacturing the articles called for in the requisition.

DECISION.

1. The original requisition, or order, set out the price to be paid for the articles to be delivered thereunder. The supplemental agreement entered into on May 5, 1919, preserved the rights of both contracting parties under the original requisition in the event it should be reinstated, and no provision was made for reimbursement to claimant in the event of an increase in the wages of labor. The terms of the agreement are clear and specific, and in the absence of fraud or mistake, neither of which is alleged, this Board is without authority to grant the relief sought.

2. The decision of the Board of Contract Review and Claims Board, Construction Division of the Army, is affirmed.

Col. Delafield and Maj. Taylor concurring.

Case No. 1561.

In re CLAIM OF CLEVELAND CITY FORGE & IRON CO.

1. **INSTRUCTIONS TO MAKE NEW SUBCONTRACT.**—Where a prime contractor is delayed in performance of its contract because of slow work and delayed deliveries on the part of a subcontractor and is therefore instructed by competent authority to cancel its subcontract and take a new one at higher cost with a subcontractor specified by that authority, there is an implied agreement within the terms of the act of March 2, 1919, such as will entitle the prime contractor to reimbursement of such additional cost.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied agreement made in connection with performance of an informal written contract for manufacture of steel plugs. Claimant was directed to enter into a new subcontract at a higher cost than that of the old subcontract. Held, claimant is entitled to relief under the act.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, of 1919, for \$1,545 by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The principles of law involved in this case are identical with those upon which Case No. 1456 was heretofore decided by this Board, the claimant being the same in each case. The evidence, documentary and otherwise, is the same in each case, and both cases were heard by the Board at the same sitting.

3. The steel shell plugs, in this case, were of a different type, known as Type "B." The procurement order, in this case, covered 400,000 Type "B" plugs, at a price of 25½ cents per plug. This price was made up as follows:

For the forging.....	\$0.219
Plus the exact cost price to the claimant of machining, which under its contract with the National Acme Co. was.....	.0335
Thus making the total price for each plug.....	.2525

it being understood by the parties that the claimant was to make no profit by reason of the machining.

4. No formal contract was ever signed, but under said order the claimant, up to the time of the armistice, had manufactured and de-

livered to the Government 125,433 Type "B" plugs, for which it has been paid by the Government as provided in said order.

5. As in Case No 1456, above referred to, the National Acme Co. failed to machine and deliver the plugs as required, and upon instructions from the Government the claimant made a contract for machining with the Weeks-Hoffman Co., of Syracuse, N. Y., under which, however, the claimant was required to pay for such machining 10 cents per plug, instead of 3 35/100 cents per plug.

6. Of the 125,433 plugs delivered to and accepted by the Government, 23,233 plugs were machined by the Weeks-Hoffman Co., and for such machining the claimant has paid the Weeks-Hoffman Co. 10 cents per plug, or 6 65/100 cents more per plug than the Government has paid the claimant for such machining.

7. The claimant, therefore, contends that there exists an implied agreement upon the part of the Government to reimburse it for the amount that it actually paid out by reason of paying 6 65/100 cents more per plug for 23,233 plugs than was estimated to be the actual cost of machining said plugs when the original order was given by the Government; or, as stated in another form:

Claimant paid the Weeks-Hoffman Co. for the machining of 23,233 plugs at \$0.10 each-----	\$2,323.30
Had the National Acme Co. done the machining, as originally arranged for, claimant would have paid it for machining said 23,233 plugs at \$0.0335 each-----	778.30

The amount of the claim is therefore----- 1,545.00

8. The evidence and testimony in relation to the foregoing transactions is the same as in said Case No. 1456, above referred to.

DECISION.

This Board finds, from the facts brought out, that an implied agreement arose between the claimant and the United States within the meaning of the act of March 2, 1919, known as the Dent Act, which the Secretary of War is authorized to adjust, pay, or discharge upon a fair and equitable basis. Upon the faith of such agreement the claimant caused to be performed, for the benefit of the United States, services which the United States accepted and received at an actual cost to the claimant, exclusive of any prospective or possible profits, of \$1,545, in which amount the claimant is entitled to reimbursement by the United States.

DISPOSITION.

This Board will make a statutory award in accordance with this decision, and will cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield, Mr. Harding, and Mr. Bryant concurring.

Case No. 666.

In re CLAIM OF NORTH JELICO COAL CO.

1. **DIVERSION OF COAL—COLLECTION AND CONVERSION OF PRICE BY GOVERNMENT AGENT.**—Where a local fuel administrator, who had authority to divert a consignment of coal, exceeded his authority by collecting therefor and converting the proceeds thereof to his own use, such conversion entails no obligation on the part of the Government to reimburse the shipper for the coal, under the act of March 2, 1919.
2. **RULES AND REGULATIONS—EFFECT OF.**—Where the United States Fuel Administrator, as an agency of the President, under the authority vested in him by the act of August 10, 1917 (known as the Lever Act), made certain rules and regulations for the more effective enforcement of said act, such rules and regulations have the force and effect of law.
3. **DIVERSION BY FUEL ADMINISTRATOR—LIABILITY OF PARTIES.**—Where the rules and regulations of the United States Fuel Administrator provided that all shipments of coal be subject to diversion on orders of a Fuel Administrator and that when so diverted the person receiving the coal shall be obligated to pay the shipper therefor, and where the claimant on orders of the district fuel administrator at Knoxville, Tenn., shipped a car of coal to the camp quartermaster at Macon, Ga., for the United States Government and such shipment was diverted by the local fuel administrator at Macon to another party, such shipment will be presumed to have been made in view of such rules and regulations and that claimant thereby agreed in advance of such shipment that the coal might be diverted in transit so as to divest liability from the United States Government to pay therefor.
4. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$166.83, the price of a car of coal. Held, there is no obligation on the part of the Government to reimburse claimant for the coal.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$305.09, by reason of an alleged agreement between the claimant, North Jellico Coal Co., and the United States.

2. On April 27, 1918, the claimant, North Jellico Coal Co., of Louisville, Ky., shipped a carload (car No. 62480) of coal from its mine at Wilton, Knox County, Ky., invoiced to the camp quartermaster, Camp Wheeler, Macon, Ga., at \$138.86. On May 1, 1918,

claimant shipped from its same mine another carload (car No. 80547) of coal, invoiced to the camp quartermaster, Camp Wheeler, at \$166.83. The orders for these two shipments were given by the United States fuel administrator at Knoxville, Tenn. The two carloads of coal arrived at Macon, Ga., but were never delivered to the consignee.

3. After the arrival of the two carloads of coal at Macon, Ga., J. L. Jessup, the local fuel administrator at Macon, Ga., informed Mr. S. R. Jacques, president of the Juliette Milling Co., that the camp quartermaster at Camp Wheeler had an excess quantity of coal and requested to know whether Mr. Jacques desired car No. 80547 diverted to his use. Mr. Jacques expressed his wish that this be done. Thereupon Mr. Jessup diverted this carload of coal to Mr. Jacques, and received his personal check, dated May 9, 1918, for \$166.83 (the invoiced amount for the coal), payable to the order of "J. L. Jessup, F. A." This check was indorsed "J. L. Jessup." The original invoice for this shipment is marked "Paid May 9th, 1918, J. L. Jessup, Local Fuel Administrator." At the time of his payment to him Mr. Jessup made no representations to Mr. Jacques of his authority to receive payment.

4. On or about May 4, 1918, Mr. Jessup diverted to the Macon Fuel Supply Co., of which Mr. B. B. Taylor was manager, the coal in car No. 62480, which had been consigned to Camp Wheeler. The Macon Fuel Supply Co. was in the business of supplying coal to local consumers. It was accustomed to keep a deposit of \$300 with Mr. Jessup, the local fuel administrator, so that whenever it was out of coal he would divert carloads of coal consigned to others, so it could supply the local consumers. Car No. 62480 was delivered to the Macon Fuel Supply Co., and pursuant to the practice just stated, the cost therefor of \$138.86 was to be taken out of the fund of \$300 which Jessup held on deposit. No receipt was produced nor other showing made to indicate this payment. Mr. Taylor stated that Mr. Jessup pretended to have authority from Dr. L. G. Hardman, the State fuel administrator, to collect the purchase price of coal which he diverted.

5. On May 14, 1918, Mr. J. L. Jessup was killed in an accident. His estate is insolvent. The North Jellico Coal Co. has never received payment for the two carloads of coal from either Jessup during his lifetime or from his estate. The Fuel Administration, regardless of legal liability, has no funds with which to meet this claim. Examination of the files of the United States Fuel Administration failed to disclose any evidence that Mr. Jessup ever made an account of the money collected for the coal either to the Government, or to the State fuel administrator, or to the North Jellico Coal Co.

6. The claim is based upon the contention that there was an implied contract on the part of the Government, acting through Mr. Jessup, the local fuel administrator at Macon, Ga., to pay to claimant the value of the coal which he diverted to local concerns at Macon, and that the Government has actually received the value of the coal from the consumers by their payment to the local fuel administrator, but has failed to pay the claimant.

7. The attorney for the claimant waived an oral hearing, and filed in lieu thereof a typewritten brief in which he stated that, in view of the fact that the investigation discloses no evidence to show that Mr. Jessup was ever paid \$138.86 or any part thereof for coal delivered to Mr. Taylor, manager of the Macon Fuel Supply Co., the claim, in so far as that carload is concerned, is not insisted on.

DECISION.

1. So much of the claim as involves the shipment of coal which was diverted to the Macon Fuel Supply Co. must fail for lack of evidence that the supply company ever paid for the coal. Further reasons showing the invalidity of this part of the claim will appear in the discussion below.

2. As to that part of the claim which relates to the item of \$168.83, the following pertinent facts appear:

The claimant shipped a carload of coal to Macon, Ga., consigned to the camp quartermaster at Camp Wheeler. Mr. Jessup, the local fuel administrator at Macon, diverted this coal to Mr. Jacques, of the Julliette Milling Co., and received his personal check for the value of the coal. Five days later Mr. Jessup was killed, without having accounted for the money received, either to the State fuel administrator, the United States Fuel Administration, the claimant, or any agency of the Government. His estate is insolvent and he left no funds or bank account. The conclusion follows that he converted to his own use the money received for the coal.

3. As applicable to this case, the pertinent provisions of the act of March 2, 1919, under which this Board is functioning, are that the Secretary of War is authorized to adjust, pay, or discharge any agreement, express or implied, for the acquisition or control of supplies, upon a fair and equitable basis, that may have been entered into by the claimant in good faith prior to November 12, 1918, *by any officer or agent acting under the authority, direction, or instruction of the Secretary of War, or that of the President.* Further provisions of the statute are unnecessary to recite.

This statute is not applicable to any transaction or act which does not fall precisely within its scope. It sanctions allowances for obligations and expenditures only which have been expressly or im-

pliedly authorized by a duly constituted agent of the President or the Secretary of War, and which may be definitely traced to a particular transaction. It was not intended as a clearing house for the adjustment of every conceivable embarrassment that might grow out of business relationship with the Government during the war. (Wray Bros. Mfg. Co., 1 Dec. Bd. Cont. Adj. 383.)

The first question which arises is whether Mr. J. L. Jessup, the local fuel administrator at Macon, Ga., in receiving the money for the coal diverted by him, did so receive it as an officer or agent acting under the authority, direction, or instruction of the Secretary of War or that of the President. To answer this question we must ascertain the duties, powers, and limitations of power of a fuel administrator.

4. On August 10, 1917, Congress passed what is known as the Lever Act, entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel."

Under the powers granted him in this act, the President issued an Executive order on August 23, 1917, by which he appointed Dr. Harry A. Garfield United States Fuel Administrator, with authority to carry the Lever Act into effect, and in order to do so, to make necessary rules of practice, orders, and regulations and to employ subordinates.

By order of the United States Fuel Administrator of December 31, 1917, the State fuel administrator was authorized, whenever he deemed it necessary, to take the following action:

"He may divert to or for the use of such domestic consumers, or to or for the use of any such public utility, any coal or coke in transit by railroad or other conveyance within such State and consigned or intended for delivery to any consumer, dealer, or other party therein for consumption, sale, or use in such State. Such diversions shall be made in accordance with the lawfully published tariffs and reasonable regulations of the railroads now under control of the United States Director General of Railroads. As soon as practical after diversion the State fuel administrator shall cause notice to be sent both to the shipper and to the consignee of the coal or coke so diverted; and the shipper thereof will be expected, so far and as soon as practicable to replace for such consignee an equal amount of coal or coke of the same grade and quality as that diverted."

On January 14, 1918, the United States Fuel Administrator issued the following order relating to the rights, duties, and obligations of the various parties in the event that coal should be diverted by order of a fuel administrator:

"All shipments of coal, whether f. o. b. mines or otherwise, and all shipments of coke f. o. b. ovens or at place of storage or otherwise, shall be made subject to the diversion of such coal or coke by

the United States Fuel Administrator or any persons acting under his authority, to any persons or consumers or for any of the purposes heretofore or hereafter authorized by him. The title of the purchaser, consignee, or consumer, in the case of any such shipments of coal or coke, which by custom or law might become vested at the time and place of such shipment, shall from and after the effective date hereof be subject to the condition that the coal or coke so shipped may be diverted as aforesaid, and that in case of any such diversions, the title and interest of such purchaser, consignee, or consumer, with respect to any coal or coke so diverted shall be completely divested and terminated and his liability to pay therefor shall cease. The person or consumer to whom such coal or coke is diverted shall become liable as of the time of such diversion to pay to the shipper thereof the price in force at the date of shipment as fixed therefor by or under authority of the President of the United States, plus transportation charges thereon and plus a handling charge of 15 cents a net ton to cover costs of rebilling, collection, and replacement. If such handling charge is made, no jobber's commissions shall be added to the mine's price. If the coal or coke so diverted was shipped under a valid and enforceable contract, the quantity thereof so diverted shall not be charged against the amount to which the contract applied."

5. It is well established by the authorities that when Congress has legislated upon a particular subject, and has left the details to the head of an executive department, with the power to make rules and regulations to effectually administer the statute, the rules and regulations made by him, within the scope of his authority, have the force and effect of law, as though incorporated in the statute by Congress.

United States v. Grinand, 220 U. S. 506.

United States v. Eaton, 144 U. S. 677.

United States v. Dastervigues, 118 Fed. 199.

Field v. Clark, 143 U. S. 649.

In re Kollock, 165 U. S. 526.

Butterfield v. Stranahan, 192 U. S. 470.

The purpose of the Lever Act was to secure an adequate supply and equitable distribution of coal and coke for the successful prosecution of the war. By this act Congress vested in the President or his authorized agent, the Fuel Administrator, power to enforce the statute, with the power to make rules and regulations for so doing. The rules and regulations established by the United States Fuel Administrator are such rules as are authorized by the statute, and, therefore, have the force and effect of law.

6. By proclamation of the President of March 15, 1918, dealers in coal and coke were required to secure a license from the United States Fuel Administrator. Only those concerns securing licenses were permitted to deal in coal. The terms under which such licenses were to be granted and held, as set forth in rule 7 contained in the proclamation, is as follows:

"Rule 7. Every license shall be in such form and shall contain such terms, provisions, limitations, and restrictions as the United States Fuel Administrator may from time to time prescribe, and the same shall be subject to modification and revocation by him, and shall be issued and held subject to these and such further rules and regulations as he may from time to time establish."

From then on, coal dealers were not free agents to sell and ship coal to whomsoever they wished, but were licensees subject to the Lever Act, and the rules and regulations made in pursuance thereto. The claimant received notice of the appointment of Mr. E. R. Clayton as district fuel administrator at Knoxville, and that his duties required him to allot orders among the mines and operators in his producing district in a manner which he deemed most equitable. When the claimant received from Mr. Clayton the order for the shipment of the coal covered by this claim, it knew full well that the order was issued as an allotment order under the powers vested in him as district fuel administrator, and it accepted the order subject to the provisions of the Lever Act and the rules and regulations of the United States Fuel Administrator.

It follows that the contract for shipment of the coal must be presumed to have been made in view of the Lever Act and the rules and regulations thereunder, and that claimant thereby agreed in advance of shipment that the coal might be diverted by the local fuel administrator so as to divest liability to pay therefor from the United States, and to impose such liability on the persons to whom the coal was diverted.

7. While the order of January 14, above quoted, gives a fuel administrator power to divert coal in transit and, in effect, constitutes him agent of the United States to do so, we fail to find in the statute or in any orders of the United States Fuel Administrator, any authority for a local fuel administrator to receive payment from the person to whom coal is diverted or any expressions from which it may be assumed that he is an agent of the United States for that purpose. On the contrary, the order of January 14, 1918, expressly imposes liability on the person to whom the coal is diverted to pay the shipper the value thereof. The fuel administrator has nothing whatever to do with the money part of the transaction. His duties are only to provide fuel where it is most needed during the war-time emergency. His powers and duties end when he has done so, in so far as that particular transaction is concerned. The liability of the original purchaser ceases the moment the coal is diverted, and the liability to pay therefor is imposed on the person to whom the coal is diverted. To pay whom? The fuel administrator? No! The shipper—as the order of January 14 expressly provides.

6. With language so plain and unambiguous, it is difficult to understand how it can now be contended that a local fuel administrator is the agent of the United States, authorized to collect for a shipper payments made by the person to whom coal is diverted. It is plain that if the person to whom coal is diverted pays the local fuel administrator, he does so at his own peril, as such payment is made in direct contravention of the order of the United States Fuel Administrator, under whose rules of practice and procedure the local fuel administrator and the other parties are acting. Payment to a local fuel administrator is not payment to the Government, because he has no authority to receive such payment. It is not payment to the shipper or to an agent of the shipper, because neither the Lever Act nor any order of the United States Fuel Administrator has created such an agency, but, on the contrary, the order of January 14 has made a direct contractual relation between the shipper and the person to whom coal is diverted. It follows, therefore, that the payment made in this case by Mr. Jacques was made at his peril, and was not made to any officer or agent of the President or Secretary of War authorized to receive it.

7. Even though the shipper may be out of pocket in this case, still this Board has no jurisdiction to grant him relief at the hands of the Government. This Board has held (1 Dec. Bd. Cont. Adj. 48) that it has no jurisdiction to allow a claim arising out of a contract executed by an officer acting beyond the scope of his authority and in violation of the orders of his superior officers, because, under such circumstances, the officer is not acting under the authority, direction, and instruction of the Secretary of War within the meaning of the act of March 2, 1919. This Board has also held (1 Dec. Bd. Cont. Adj. 38) that it has no jurisdiction of a matter arising out of a contract which is not binding on the Government. The order of January 14, 1918, created a direct contractual relation between the shipper and the person to whom the coal has been diverted. It terminates the prior contractual relation between the shipper and the original purchaser. In no respect does it create any other contractual relation or agency, and imposes no liability on the Government or its agent whatever. If a fuel administrator attempts to assume obligations in relation to such contract, or receive moneys due to the shipper, he would not be acting as agent of the Government in so doing, but would be acting wholly beyond the scope of his authority as fuel administrator and in violation of the orders of his superior, the United States Fuel Administrator. It follows that Mr. Jessup, in receiving the money for the coal from the persons to whom the coal was diverted, was not acting, in so doing, under the authority, direction, or instruction of either the President or Secretary of War, within the meaning of the act of March 2, 1919.

8. An effort was made by claimant to prove that Mr. Jessup, as local fuel administrator, had been accustomed to receiving money from persons to whom he diverted coal, and that this fact was known by the State fuel administrator. In his affidavit Mr. Jacques denied having any knowledge that Mr. Jessup had previously collected from others. He denied that Mr. Jessup made any representations to him of having authority to receive the money for the coal. He also denied having any previous business dealings with Mr. Jessup as fuel administrator. Even if it were admitted that Mr. Jessup had previously collected money from others, knowledge of such custom was never made known to Mr. Jacques previous to his paying the money in this case, and, therefore, the alleged custom can not be relied on by him as the basis of an implied agreement for fixing liability on the Government.

9. It has been shown that Mr. Jessup received the money from the person to whom he diverted the coal, without authority in law and in direct contravention of the orders of the United States Fuel Administrator. Though he was the agent of the President for the purpose of diverting the coal, he exceeded his powers by collecting the money and appropriating it to his own use. Not only were such acts beyond the scope of his authority, but they amounted to misfeasance in office, suggesting criminality. These tortuous acts may not be made the basis of implying an agreement on the part of the Government to make good the loss. In the case of *Gibbons v. United States*, 8 Wall. 269, the Supreme Court said:

"It is not to be disguised that in this case an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officers, those acts being in themselves torts. No Government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized power of its officers or agents.

"In the language of Judge Story (Story Aq. sec. 319), 'It does not undertake to guarantee to any person the fidelity of any of its officers or agents who it employs, since that would involve it in all its operations in endless embarrassments, and difficulties and losses, which would subserve the public interest.'"

To similar effect are the decisions of the following cases:

Robertson v. Sichel, 127 U. S. 515, holding an officer is not responsible for the torts of his subordinates.

German Bank v. United States, 148 U. S. 579, holding that the United States is not liable for the wrongful cancellation of bonds by the Register of the Treasury.

Bigby v. United States, 188 U. S. 400, denying action against the United States to recover damages for injuries received by a fall from a Government elevator operated by an employee of the Government.

Minturn v. United States, 106 U. S. 437, holding it was no defense in an action on an importer's bond that the customs officer was guilty of an unlawful act in giving up the goods without requiring the payment of duty.

Carpenter v. United States, 45 Fed. 374, holding that where a Government employee, having received property into his possession with the consent of the owner that it be used for a certain purpose, used it by order of his superior officers for another purpose, there was no legal implied contract of hiring for Government use.

Hart v. United States, 95 U. S. 316, which involved a suit on a distiller's bond, and the defense relied on the fact that the collector of internal revenue, in violation of the law, allowed certain spirits to be taken out of bond without payment of the tax. The court held that this was no defense, because the Government had not contracted with the surety that its officers shall properly perform their duties. The court said:

"A Government may be a loser for the negligence of its officers, but it never becomes bound to others for the consequence of such neglect, unless it be by express agreement to that effect."

10. In the foregoing cases the courts steadfastly refused to impose liability on the Government for the unauthorized act, neglect, dereliction of duty, or the exercise of unwarranted functions by officials or employees. That injury or tort to an individual may have been caused by such acts or neglects is not the test. The test is whether the Government has authorized or approved the act, and whether it has agreed to guarantee every act of its officials or employees. Although the decision in the *Bigby case* (supra) was rendered on the question of the court's jurisdiction under the Tucker Act, yet the same doctrine there announced has so frequently been repeated in other cases involving quite different questions, as to establish as a legal principle the doctrine that the Government is not responsible for the misfeasance or unauthorized acts of its officers or agents. It follows from the authorities above noted that no implied agreement or contract can be spelled out of the unauthorized act of the local fuel administrator at Macon in receiving the price of the coal from the person to whom he had diverted it, because the Government is not bound by the misfeasance or unauthorized acts of its officers or agents.

11. The Board is, therefore, of the opinion that there is no showing in this case that claimant entered into an agreement, express or implied, with any officer or agent acting under the authority, direction, or instruction of the Secretary of War, or that of the President, within the meaning of the act of March 2, 1919. For the reason stated, therefore, the relief sought by the claimant is denied.

Col. Delafield and Mr. McCandless concurring.

Case No. 1199.

In re CLAIM OF INTERNATIONAL SILVER CO.

1. **RECOMMENDATION.**—A statement by a Government officer that it was his intention to recommend a contract does not make a contract.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$1,154.45 for loss suffered by reason of an alleged contract for mess-kit knives. Held, there was no agreement within the meaning of the act.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$1,154.45, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. During the month of October, 1918, the claimant company was engaged upon the performance of a duly executed contract with the United States Government for the manufacture of 1,000,000 mess-kit knives.

3. During the month of October, 1918, it appeared as if the Government would require a large additional supply of mess-kit knives, and the Supplies Division of the Quartermaster Corps, through Lieut. E. Carlisle Hunter, Quartermaster Corps, entered into negotiations with T. B. Lasher, the duly authorized and acting agent of claimant company, for a contract for an additional 1,000,000 knives.

4. Lieut. E. Carlisle Hunter in his capacity of negotiating officer for the General Supplies Division, Quartermaster Corps, had no authority to enter into any contracts. His authority was simply to make recommendations, and in the instant case this was conveyed to the agent of claimant company as disclosed in the following testimony:

“Q. What was your authority in the matter of placing contracts?”

“Lt. HUNTER. My authority in the Quartermaster Corps, General Supplies Division, was to make recommendations.

“Q. You had no authority to place contracts, or to place orders for material?”

“Lt. HUNTER. It was my understanding that no negotiating officer had authority to place an order without it being passed upon by the Contract Board.

"Q. Did you endeavor to convey that, Lieutenant, to the men you did business with?

"Lt. HUNTER. Yes sir. * * * That was clearly put up to us, and I invariably tried to make it plain to prospective contractors that my authority only allowed me to make recommendations. * * * Therefore I stated to Mr. Lasher that it was my intention to recommend the International Silver Company for a contract for a million mess-kit knives at ten cents each. I think that covers this case."

DECISION.

1. From the foregoing facts this Board finds that the officer with whom claimant negotiated for the alleged contract or agreement had no authority to enter into such contract on the part of the Government.

2. That the alleged contract or agreement herein is based upon a recommendation only by the negotiating officer.

3. The recommendation for an award is not such a contract or agreement as contemplated within the act of March 2, 1919. Lakeside Biscuit Co., Case No. 276, and others decided by this Board.

4. For the foregoing reasons, the relief asked for by petitioner is denied.

DISPOSITION.

1. A final order denying relief will issue.

Col. Delafield, Mr. Eaton, and Mr. Henry concurring.

Case No. 1606.

In re CLAIM OF THOMAS ROBERTS & CO. (FACTORS FOR W. S. DAVIDSON).

1. **CONTROLLED INDUSTRY—RIGHTS AND LIABILITIES OF PARTIES.**—Where the United States Food Administration issued a bulletin and mailed same to claimant requiring 45 per cent of its pack of 1918 canned tomatoes for Army, Navy, and Marine Corps purposes, and guaranteed claimant to take such per cent of such pack, and where such action on the part of the Food Administration was adopted by the War Department as its own, there arose, under the act of March 2, 1919, an obligation on the part of the United States Government to reimburse claimant its loss sustained in complying with the order given.
2. **PURCHASE ORDER AFTER DELIVERY OF GOODS.**—Where a purchase order is issued after the delivery of goods under an informal contract it is of no effect except as evidence of the agreement.
3. **PURCHASE ORDER NOT IN COMPLIANCE WITH COMPILED STATUTES 6853.**—Where a purchase order does not come within the exceptions to United States Revised Statutes, section 3744, as found in United States Compiled Statutes 6853b, and the regulations made in compliance therewith, it is itself, when accepted, an informal agreement.
4. **INFORMAL CONTRACT—ATTEMPTED SETTLEMENT PRIOR TO MARCH 2, 1919—INVALID.**—An attempted settlement of an informal contract prior to the passage of the act of March 2, 1919, is invalid because of not being based upon a valid consideration and should be disregarded.
5. **CLAIM AND DECISION.**—This claim is for \$1,329.25 arising under the act of March 2, 1919, by reason of the failure of the Government to accept and pay for 45 per cent of claimant's pack of 1918 canned tomatoes. Held, that the Government is obligated to reimburse claimant to the extent of its loss by reason of the failure to accept and pay for the goods, and that the contract of settlement made prior to March 2, 1919, is void for want of consideration.

Mr. Harding writing the opinion of the Board.

This claim comes to the Board of Contract Adjustment as a Class B claim, it first having been submitted to the Claims Board, Office of Director of Purchase, April 17, 1919, and forwarded to this Board by letter under provisions of Supply Circular No. 17. Not an appeal.

FINDINGS OF FACT.

1. On July 30, 1918, the United States Food Administration issued its Bulletin No. 10, of which a copy was sent to W. S. Davidson, Bowers, Del.:

"You are now advised that the requirements have been increased to 33½% of the total 1918 pack of canned tomatoes. The Army,

Navy, and Marine Corps guarantee to take and you are hereby directed to hold the above percentage of your pack."

Somewhat later the United States Food Administration issued its Bulletin No. 12:

"By United States Food Administration Bulletin No. 10 you were advised that the Army, Navy, and Marine Corps placed their minimum requirements of canned tomatoes at 33 $\frac{1}{3}$ % of the total 1918 pack. You are now advised that the total requirements have been increased to 45% of the total 1918 pack of canned tomatoes. The Army, Navy, and Marine Corps guarantee to take and you are hereby directed to hold the above percentage of your pack."

2. Forty-five per cent of the pack of said W. S. Davidson, on behalf of whom this claim was made, amounted to 4,426 cases. On October 8, 1918, said W. S. Davidson wrote the United States Food Administration that he had finished packing his tomatoes and asked for the proper forms to be filled out and contracts sent him, as he would like to have the goods shipped out; in answer thereto, on October 11, 1918, the Food Administration sent him Form A on which to report his pack of tomatoes and—

"on receipt of this Form 'A' properly filled out will arrange for inspection and shipping instructions."

On October 22, 1918, the report was sent to the United States Food Administration and the said W. S. Davidson asked for information as to when and how inspection was to be made and asked for shipping instructions.

On November 5, 1918, the Director of Purchase and Storage notified the quartermaster at Baltimore, Md., that the 4,426 cases of said W. S. Davidson's tomatoes were available for the Army and requested that purchase order and shipping instructions be issued promptly. November 7, 1918, the depot quartermaster, Baltimore, Md., addressed a communication to said W. S. Davidson, asking him to notify the quartermaster's office at once to what point the order would be shipped, and directing that the containers be strapped with either one-half inch or five-eighths inch flat iron strapping. On November 8, 1918, said W. S. Davidson wrote the depot quartermaster at Baltimore, Md., that part of the goods were strapped and that he would finish strapping on the rest of them by the time orders were received for shipment, that he was using five-eighths inch flat iron strapping, and that the goods would be shipped from Bowers, Del., by way of steamer *Fredericka*, to Philadelphia, and there transferred to whatever point the quartermaster might designate by railroad or steamboat.

On November 12, 1918, the claimants here, Thomas Roberts & Co., wrote the United States Food Administration that they had a power of attorney from said W. S. Davidson for handling the goods and

that they had handled his account for a number of years; that 45 per cent of his pack was 4,426 cases, and that the goods were all labeled, strapped, and ready for shipment.

3. After the armistice was signed there remained still to be shipped 3,500 of the cases in question containing 7,000 dozen cans, and the last Government provisional price was fixed at \$1.85 per dozen cans. After that time the Government issued its purchase order for the tomatoes, cancelled the contract by a cancellation agreement, and the Board of Claims, Director of Purchase, later issued its Certificate C for the settlement of the claim.

4. No power of attorney is found in the files authorizing the said Thomas Roberts & Co. to collect the claim of said W. S. Davidson against the Government. Thomas Roberts & Co. were factors for the said W. S. Davidson.

Sworn statement of contractor is set out in their petition as follows:

Cost of strapping tomato cases.....	\$132. 81
Labor for strapping tomato cases.....	154. 94
Freight on strapping for tomato cases.....	1. 33
Carrying charges of $\frac{1}{4}$ of 1 per cent per month for two months.....	163. 79
Storage, 2 cents per case per month for two months.....	177. 08
Loss sustained on 3,500 cases reserved for the Government, being the difference between the last provisional price of \$1.85 per dozen established by the Government and the price at which the goods were sold to the American Stores Co., namely, \$1.75 per dozen—7,000 dozen at 10 cents per dozen.....	700. 00
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	1, 329. 95

DECISION.

1. The United States Food Administration was a Government agency and its action was adopted by the War Department as its own. The above facts evidence a contract whereby on the date of the United States Food Administration Bulletin No. 10, July 30, 1918, the claimants entered into a contract with the Government whereby they set aside for Government use, upon the guaranty of the Government to take them, 4,426 cases of canned tomatoes; and the consideration therefor was that the Government agreed to pay a reasonable price for the same, thereafter to be fixed, and the provisional price of which was thereafter fixed at \$1.85 per dozen cans. (Winfield Webster Co., Case No. 478.) The number of cans not taken by the Government when it cancelled the arrangement amounted to 3,500 cases or 7,000 dozen cans.

This case was considered together with Nos. 1608 and 1609.

2. The above case is one contemplated by the act of March 2, 1919, and comes within its provisions and is subject to adjustment there-

under. A power of attorney should be furnished by W. S. Davidson to Thomas Roberts & Co., and placed in the files, authorizing the claimants here, Thomas Roberts & Co., on behalf of the claimant to settle and adjust this claim, and to receive the award, if any made thereon, and to receipt for any money paid in the fulfillment of such award and to give the Government a release in full.

The purchase order issued for these tomatoes, the cancellation agreement made January 18, 1919, and the Certificate C issued by the Claims Board, Director of Purchase thereon should be disregarded as void and set aside, the purchase order and settlement contract having been executed after the armistice and before the passage of the law of March 2, 1919.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. McCandless concurring.

Case No. 1628.

In re CLAIM OF DIRECT-O-LIGHT CO.

1. **FACILITIES—ORAL AGREEMENT, TOO VAGUE.**—Where a duly authorized agent of the Government promises a manufacturer if it will install certain special machinery for the manufacture of airplane parts that orders for such parts will be given it by the Government, but no definite promise is made as to the number of parts to be contracted for, no price is fixed for the parts, and no agreement is made that future orders will be sufficient to amortize the cost of the machines, such a promise is too vague and indefinite to constitute an agreement under the act of March 2, 1919.
2. **SAME.**—Where an authorized representative of the Government advises the manufacturer that if it will install certain special machinery for the manufacture of airplane parts, it will be kept busy on Government work, such promise must be construed as limited by the requirements of the Government on account of the war, and such obligations of the Government as might arise therefrom were terminated by the armistice.
3. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for machinery purchased in anticipation of Government contracts. Held, claimant not entitled to reimbursement.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$7,311.25, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant, Direct-O-Light Co., makes makes claim under the act of March 2, 1919, for reimbursement for machinery and equipment purchased and labor expended in installing that machinery, alleging that it was induced to make these expenditures at the request of Capt. Gerard J. Eding, Air Service, Aircraft Production, who was an officer in charge of aircraft production in the district in which claimant's factory was located.

3. It appears that in September, 1918, Capt. Eding had given an oral order to Mr. Cleburne Eberhart, Jr., manager of the claimant company, for the manufacture of long cylinder studs for airplanes. In confirmation of this oral order claimant was sent, from Washing-

ton, written order No. 730613, dated October 18, 1918. Claimant was also sent, from Washington, order No. 730654, dated October 22, 1918, for the manufacture of an additional quantity of long cylinder studs. Claimant's plant was fully equipped to manufacture long cylinder studs. It did make and deliver all the long cylinder studs called for in these two orders, and has been paid in full for them. The machinery and equipment for which claim is now made was not acquired for the purpose of making long cylinder studs, but for the purpose of making other small parts entering into the construction of airplanes.

4. In the middle of September, 1918, Capt. Eding asked Mr. Eberhart whether the claimant company could manufacture some other small parts for airplanes which were made by the use of automatic screw machines. A few days later Mr. Eberhart informed Capt. Eding that he had learned where he could purchase two $\frac{3}{4}$ -inch Model "A" Cleveland automatic screw machines and a No. 2 tilted turret lathe with equipment, with which the Direct-O-Light Co. could manufacture the other small parts for airplanes which the Government desired.

These machines were purchased by the claimant, as well as some other machinery and equipment, and were received by it during November. The claimant contends it purchased the machines by reason of the remarks made to Mr. Eberhart by Capt. Eding, which will be set forth in the next paragraph. The claimant never received any order from the Government for making the parts for airplanes for which this machinery and equipment was intended, but now claims reimbursement of the damages it has sustained by reason of having purchased this machinery.

5. The claimant contends that it made the purchase of the machines in question because of the remarks made to its Mr. Eberhart by Capt. Eding when Mr. Eberhart told Capt. Eding that he had located two Cleveland automatic screw machines and a tilted turret lathe. There is a direct conflict in the testimony on this subject.

Mr. Cleburne Eberhart, Jr., the only witness for the claimant and the representative of the claimant company, testified in substance and effect as follows:

In the latter part of September, 1918, Capt. Eding asked me if we could get in a position to handle a larger line of small parts such as bolts, nuts, and miscellaneous small parts for aircraft work. I answered that we were not equipped for handling the work. Capt. Eding wanted to know how long it would take to get equipped, and where we could get the machinery. I told him I would look around and try to find out. Capt. Eding told me to go ahead and see what I could do, and see if I could get in position to do this additional work.

A few days later I told Capt. Eding that I could get two Cleveland automatic machines and a wood turret lathe. Capt. Eding told me to go ahead and order them, and orders would come through for bolts and nuts. He then instructed Lieut. Hawkridge to give me specifications for the bolts and nuts, and Lieut. Hawkridge gave me two blue prints. We wrote for dies and tools to make these nuts, and I ordered the Cleveland automatic screw machines and the turret lathe, which were of no use to make long cylinder studs, but were designed particularly to make bolts and nuts, as shown by the blue prints that Lieut. Hawkridge gave me. The Cleveland automatic machines were received on November 10 and the other machine was received on November 14, 1918. We also ordered four Porter-Cable lathes. Capt. Eding had not spoken of these lathes, but had only said to go ahead and put in some machinery, and so we took it for granted that he wanted us to get equipped to do this work. I did not then speak to him about this other machinery.

At first Mr. Eberhart testified that he did not believe Capt. Eding made any mention of the quantity of the order for bolts and nuts that his company was to be given, or the price to be paid. Later, however, when asked the size of the order which he alleged Capt. Eding promised, Mr. Eberhart answered:

"As I recall it, around 100,000, wasn't it? * * * I am pretty sure there was a quantity stated, because the quantity influenced me in getting the machines. * * * No price had been stated on the bolts.

"Question. Do you now state that Capt. Eding told you he would give you an order for 100,000 bolts?

"Mr. EBERHART. He did not state it that way; no. He simply said that an order would come through, and from day to day, around that period, I was in Capt. Eding's office two or three times a day, and it was talked of, a large order for these bolts."

When asked more specifically just what Capt. Eding had said to him with reference to the purchase of the machines, Mr. Eberhart testified in effect as follows:

He did not say if I would buy the machines. He said, "Go ahead and buy them." He did not state, "If we put in the machinery, but when the machinery was in, he would send contract—contracts would come through."

Capt. Eding didn't say, "If you equip your plant, you would receive orders," but he said, "Equip your plant, and you will receive orders. It was not 'if.'"

Mr. Eberhart did not recollect that Capt. Eding told him if the claimant company equipped its plant for future orders its plant would be kept busy. Mr. Eberhart stated that he took the remarks of Capt. Eding to be an order to purchase the machines, and that the orders that were spoken of as coming through would offset the cost of these machines; that is, the future orders that he expected would be awarded.

Mr. Eberhart offered to withdraw the claim for the Porter-Cable machines, as his company found it could use them, but stated that his company had no use for the other machinery, tools, and equipment which it had purchased.

On the other hand, Capt. Eding testified, at the first hearing, in substance and effect as follows:

Mr. Eberhart came to me and said he was able to pick up some Cleveland automatic screw machines and a No. 2 tilted turret lathe with equipment. I stated that if he would buy these machines, I would be able, or the Bureau of Aircraft Production would be able, to keep him busy. Upon my advice he bought these machines. That is all I knew of his buying at the time. I did not advise him to purchase the Porter-Cable machine. He bought these machines, but was never able to use them, because he did not get them installed before the armistice was signed. (Record, pp. 21, 22, 23.)

I gave him those blue prints and told him that if he would equip his machinery to make these parts he would receive contracts.

"Question. That if he was equipped with the necessary machinery to make these things, you would give him the contract?

"Answer. Yes, sir. (Record, pp. 31, 32.)

"Question. What do you think you said to him, Captain?

"Answer. I stated that if Mr. Eberhart was equipped to do this particular work, he would get contracts." (Record, pp. 32, 33.)

When again asked to give the actual words he used to Mr. Eberhart in reference to future orders, Capt. Eding testified:

"It was not the intention of myself to state that he was going to get more orders on this particular contract; that is, for cylinder studs, but if he would equip his plant for future orders, regardless of what it was—for small parts—his plant would be kept busy.

"Question. Did you or did you not order him to equip his plant?

"Answer. I had no authority to order him to equip his plant, but I told him if he would equip, he would receive orders." (Record, p. 37.)

The claimant offered in evidence a letter dated February 18, 1919, written by Capt. Eding, which contains the following:

"Upon the advice of the writer he [Mr. Eberhart] was told that if he would purchase these machines, the Bureau of Aircraft Production would be able to give him considerable work. * * *

"Upon this advice Mr. Eberhart purchased these machines to take care of the great amount of work we had at that time. Mr. Eberhart advises that he bought the machines upon the advice of the writer and as the armistice was signed on November 11th, he was unable to receive any contracts to help pay for these machines and they are really a loss to his firm." (Record, p. 9.)

At the adjourned hearing on January 28, Capt. Eding testified in substance and effect as follows in regard to his conversation with Mr. Eberhart:

After the claimant had got into production of long cylinder studs, I asked Mr. Eberhart if he was equipped to take care of any other

orders for nuts, bolts, etc. He stated he was not equipped. A few days later he told me he was able to pick up two Cleveland automatic machines and a wood turret lathe. I told him if he was equipped to do business and if he had the machinery and everything for making automatic parts, he would receive orders for parts; that is, the automatic machines which he bought would be kept busy. I said if his plant was equipped, he would receive orders.

"Question. Did you give him any specific directions to go out and buy any machinery?"

"Captain EDING. When he spoke about the Cleveland automatics and the turrets, my advice was to pick them up; that they were good property.

"Question. Was that an order or advice?"

"Captain EDING. That was my advice. I had no authority to place orders; that is, with the exception of small parts and such things as that, and, of course, I could not guarantee prices. * * *

"Question. Did you at any time make an agreement with the claimant that you would give him an order for 10,000 small parts (to be) manufactured by these machines other than the long cylinder studs?"

"Captain EDING. I never specified any amount on any order, outside of the long cylinder studs, of 10,000. The order for 10,000 studs was the only agreement I made as to quantity or price."

The only promise I made was that if he had the machinery, etc., he would be kept busy. No specific amount or price was ever mentioned. I never gave Mr. Eberhart any blue prints, excepting a blue print showing the long cylinder studs.

On cross-examination Capt. Eding was questioned at length whether he ordered Mr. Eberhart to buy the machinery, but he repeatedly answered that he did not give him an order to buy the machinery, but simply advised Mr. Eberhart to do so. In reference to these matters the record shows the following statements of Capt. Eding:

"Capt. EDING. That if you were equipped, you would receive orders for small parts.

* * * * *

"Mr. EBERHART. Didn't you tell me to buy them?"

"Capt. EDING. My advice was to pick up the machines and we could keep you busy.

"Mr. EBERHART. Aren't you willing to say you told me to put those machines in, or do you want it to go into the record as advice, or do you say you did tell me to do it?"

"Capt. EDING. I could not say anything more than advice.

* * * * *

"Mr. EBERHART. Is that what you want to go through—you advised me?"

"Capt. EDING. That is the only thing I could say, is advised you.

"Mr. EBERHART. You won't state then you told me to put the machines in?"

"Capt. EDING. As I stated before, I advised you to buy the machines.

"Mr. EBERHART. You did not tell me; you advised me?
"Capt. EDING. I advised you."

DECISION.

1. The claimant contends that as a result of the statements made to its manager, Mr. Eberhart, by Capt. Eding it purchased the machinery and equipment for which it now seeks reimbursement. Excepting two orders for the manufacture of long cylinder studs, the claimant never received any award of a contract from the Government. The two orders for long cylinder studs have no connection with this claim. They have been fully completed and the amounts thereunder have been paid by the Government.

The machinery and equipment for which claim is now made were not designed, or intended to be used, for the manufacture of long cylinder studs, but for the manufacture of other small parts, such as bolts and nuts which are used in the construction of airplanes.

2. The first question which arises is whether Capt. Eding ordered Mr. Eberhart to buy the machinery and equipment, with the result that there is now an implied contract on behalf of the Government to pay for them.

It is not contended that Capt. Eding specifically promised Mr. Eberhart that the Government would pay for the cost of the machinery and equipment which were purchased. Mr. Eberhart testified that he expected to amortize the cost of the machinery and equipment out of future Government contracts, which he never got.

Whether a contract to pay for the increased facilities can be implied is dependent upon precisely what was said to Mr. Eberhart by Capt. Eding. To determine this question, we have reviewed at length the testimony of these two witnesses, and find their statements directly contradictory.

In effect Mr. Eberhart testified that Capt. Eding ordered and directed him to purchase two Cleveland automatic screw machines and one tilted turret lathe with equipment, promising that when the machinery was installed the Government would give him a contract for large quantities of bolts and nuts which these machines could make.

This testimony is positively and directly denied by Capt. Eding, who testified that he *advised*, but did not *direct* or *order*, Mr. Eberhart to purchase the machines. Capt. Eding was very positive in his statements that he only "advised" Mr. Eberhart to purchase the machines, because he had no authority to "direct" or "order" the claimant to do so.

The fact that Capt. Eding knew, at the time of his conversation with Mr. Eberhart, that he had no authority to "order" or "direct" Mr. Eberhart to purchase additional machinery must be given appro-

priate weight in view of the conflict of the evidence in this case. (Claim Keystone Knitted Fabric Co., 2 Dec. Bd. Cont. Adj. 357; claim Brady Ax & Tool Mfg. Co., 1 Dec. Bd. Cont. Adj. 278.)

In support of the claimant's contention that it purchased the machinery and equipment on account of the order or direction of Capt. Eding we find that the facts relied on by the claimant are controverted and denied in their material parts by the representative of the Government who took part in the negotiations, and who had no authority to order the claimant to do what was done. We, therefore, find that the evidence fails to support the claimant's contention in this regard. As it has not been proven that Capt. Eding ordered or directed the claimant to buy the machinery and equipment, it follows that there is no implied contract on behalf of the Government to pay for the same, based upon an assumption that the Government had ordered or directed the purchase of the machinery and equipment.

3. The remaining question to be decided is whether there is an obligation on the part of the Government to reimburse the claimant the cost of the machinery and equipment on the ground that Capt. Eding promised to award the claimant contracts for bolts and nuts when the machinery was installed. No agreement was reached as to the quantity of bolts and nuts which future orders would cover. Mr. Eberhart admitted that no price was agreed upon, and he vaguely recalled that he was promised an order "around 100,000" bolts. Capt. Eding denied that quantity or price was ever mentioned. It is clear that the testimony of Mr. Eberhart is too vague and indefinite to establish an agreement to award a contract for any definite quantity of bolts at a given price. The whole evidence conclusively shows that no promise was made of any definite order in which quantity or price was agreed upon, and no promise was made to give sufficient orders whereby claimant might amortize the cost of its new machinery and equipment.

4. The question which then arises is, What was the effect of the promise which Capt. Eding did make? In effect that promise was that if the claimant equipped its plant, or when the claimant had equipped its plant, it would receive orders for bolts and nuts which the Government required to such an extent that it would be able to keep claimant's plant busy. Both the claimant and the agent of the Government had in mind the requirements of the Government for war purposes. As no definite orders were agreed upon, it can not be believed, nor is it the claimant's contention, that the Government promised to keep the claimant's plant busy indefinitely, but only during the period of hostilities while the Government requirements should continue. The evidence fails to disclose that there was any promise that the claimant should reap sufficient profit out of future

contracts so that it might amortize the cost of the new facilities and equipment. Nothing appears in the record to support such a contention. It does, however, appear that the claimant was willing to take a business risk, on the only promise that was made, that the war would last a sufficient length of time so it might amortize the cost of the machinery and equipment which it purchased. It knew, however, that the promise to keep the claimant's plant busy was limited to the time that the Government should require the articles to be manufactured, and hence the promise must now be construed as limited to that period only. When, therefore, the armistice was signed and the needs of the Government for bolts and nuts for airplanes had ended, the obligation on the part of the Government to award the claimant contracts for bolts and nuts was likewise terminated.

At that time the claimant had not installed the facilities and equipment to make the bolts and nuts. This was a condition precedent before there was any obligation on the part of the Government to award a contract. The Government was, therefore, not obligated under its promise to award a contract to the claimant when it was not equipped to perform its part, when the needs of the Government for the articles had terminated.

On the facts shown in this case it does not appear that the Government failed to carry out the true intent and meaning of the promise of its agent, viz, that while the necessity lasted the Government would be able to keep the claimant's machinery and equipment busy after they were installed. The necessity terminated before the machinery was installed, and there was no obligation on the part of the Government under the alleged promise to award a contract until after the machinery was installed.

5. For the reasons stated, the relief prayed for is denied.

Col. Delafield and Maj. Taylor concurring.

Case No. 371.

In re CLAIM OF STANDARD OIL CO. OF INDIANA.

1. **SUSPENSION OR CANCELLATION.**—Where a contract provided that it might be cancelled by the Government on 15 days' notice, the Government could either cancel the contract, in which case it would have to pay for all the goods the claimant could manufacture during the 15 days, or suspend the contract with the consent of the contractor, in which case it would have to reimburse the claimant its losses in accordance with Supply Circular No. 111.
2. **SAME—EFFECT OF NOTICE OF CANCELLATION AFTER SUSPENSION.**—Where the Government at first chose to suspend the contract, but 5 months later gave the 15 days' notice of cancellation, it can not be permitted to profit by the fact that claimant at the request of the Government had altered its position so that it was no longer able to produce goods in the large quantities which it could have produced at the time it suspended production. The cancellation notice must therefore be considered as issued *nunc pro tunc*, and, accordingly, the settlement agreement is now to be based upon the amount of goods the claimant would have manufactured during the 15 days following the original date of suspension.
3. **CLAIM AND DECISION.**—Claim presented under General Orders 103 arising out of a formal contract for candles. Held, claimant is entitled to a settlement based upon the above principles.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim is presented in accordance with General Orders, No. 103, War Department, 1918, under the following circumstances:

2. On or about June 14, 1918, the claimant entered into a formal contract with the United States through Maj. G. E. McGowan, Quartermaster Corps, United States Army, numbered 14353, whereby it agreed to furnish and deliver approximately 10,000,000 pounds of candles (issue or lantern), serial 162 or 163, at \$0.157 per pound f. o. b. Whiting, Ind., packed 40 pounds net in wooden export boxes, strapped.

3. Pursuant to the terms of the contract, the claimant manufactured and delivered up to December 16, 1918, 7,218,480 pounds of candles, leaving uncompleted or undelivered 2,781,520 pounds, the contract price of which if delivered would have been the sum of \$436,698.64.

4. The contract provided for the delivery of 125,000 pounds of lantern candles per month and 1,500,000 pounds of issue candles per month, delivery to commence October 16, 1918, and "to be completed on or before April 20, 1919." The contract also provided:

"This contract is subject to cancellation at any time after giving the contractor fifteen days' notice."

5. The claimant, shortly after June 14, 1918, purchased or contracted for such quantities of stearic acid, boxes, strap iron, paper, and wick as would be needed for the performance of the contract for 10,000,000 pounds of candles.

6. On November 13, 1918, the Ordnance Department sent a telegram to the contractor to the effect that all overtime work on ordnance contracts must cease by November 15, and on the same day the claimant sent a telegram to Lieut. Col. McIntosh, of the Quartermaster General's Office in Washington, asking whether the telegram from the Ordnance Department covered the candle contract, and received the following telegram:

"Instruction from Chief Ordnance does not apply to candle contract. Continue three eight-hour shifts daily on candles."

The contractor continued the manufacture of candles up to December 16, 1918.

7. Capt. E. A. Hey was the contracting officer in the groceries division of the Chicago office of the Quartermaster Corps in December, 1918. On December 14, 1918, he was called on the telephone by a Mr. Parker, of the Materials Division in Washington, and "requested to take immediate steps to suspend production on all candles." Capt. Hey immediately called the claimant company on the telephone and requested them to suspend the production of candles. On December 16, 1918, Capt. Hey sent the following telegram to the department in Washington:

"Confirm telephone Saturday Hey-Parker. Standard Oil Company suspending production on contract candles in accordance with Notice 111, 112, 114. This office negotiating with contractor for complete cancellation."

There was no answer from Washington to this telegram. The reference in the telegram to Notices 111, 112, and 114 refers to supply circulars of the War Department bearing those numbers.

8. Capt. Hey examined the contract and considered the clause providing for cancellation on 15 days' notice. He had in mind that if he gave the Standard Oil Co. notice that the contract would be cancelled in 15 days the Standard Oil Co. was in a position to manufacture during the 15 days that would elapse after the receipt of the notice over \$282,600 worth of candles which the United States had no need for and did not want. He testified:

"So we concluded that if we operated under Notice [Supply Circular] 111 and requested them to suspend production that it would be in the public interest, and we did so."

Capt. Hey had been informed from other Government sources that every effort should be exercised to keep any more finished product from being delivered.

9. The Standard Oil Co. acquiesced in Capt. Hey's request to suspend production and negotiations ensued for a supplemental agreement terminating the contract. After discussion the terms for a supplemental agreement were arrived at and an agreement prepared and executed by the claimant and Capt. Hey.

10. The Board of Contract Review at Zone 7, Chicago, Ill., withheld approval of the proposed supplemental agreement on account of the cancellation clause in the original contract and determined that the contractor's claim should be "disallowed in its entirety." On May 6, 1919, the claimant received a letter from Brig. Gen. A. D. Kniskern, Quartermaster Corps, signed by Capt. E. A. Hey, as follows:

"You are hereby notified that there will be no further requirements for candles as provided in said contract (referring to contract 14353) and the uncompleted portion of said contract is hereby cancelled in accordance with the cancellation provisions herein quoted, which cancellation is to be effective in accordance with the provisions of the first clause above quoted."

11. On December 16, 1918, the claimant suspended the manufacture of candles and discharged nearly all of the employees that had been engaged in candle making. It manufactured substantially no candles for two months after December 16, 1918. On May 6, 1919, the claimant was turning out for civilian trade about 20 per cent of the amount which it had been producing in December, 1918, before the Government contract was suspended. If the claimant had manufactured candles for 15 days after the receipt of the May 6, 1919, notice it could have manufactured about 20 per cent of the amount which it would have manufactured if it had continued production after December 16, 1918.

DECISION.

1. The provision in the contract that it might be cancelled on giving 15 days' notice means that the contractor was allowed 15 days after the receipt of notice of cancellation during which it was its duty to manufacture candles, and it was the duty of the Government to receive and pay for such candles as would be manufactured during the 15 days.

2. The Government therefore, on December 16, 1918, had a choice between two alternatives. It could have given the Standard Oil Co.

15 days' notice in accordance with the provisions of the contract, in which event it would be obliged to receive and pay for about \$282,600 worth of candles which it did not want. Second, it could arrange for the suspension of production on the contract and negotiate for a settlement contract in accordance with the provisions of Supply Circular No. 111, which would result in relieving the Government of the necessity of taking and paying for a large number of candles and would place the Government under obligations to reimburse the Standard Oil Co. such losses on raw material as it had on hand on December 16, 1918, for the purpose of performing contract 14353. The evidence shows that the number of pounds not delivered under this contract on December 16, 1918, was 2,781,520, of which about 1,800,000 pounds could have been manufactured and delivered by the claimant during the following 15 days.

11. The Government chose the second alternative and agreed with the claimant that further production of candles under its contract No. 14353 should be suspended and that an agreement should be negotiated which would relieve the Government from receiving any more candles and which would reimburse the claimant for its losses on raw materials on hand for the purpose of performing this contract.

12. The terms of settlement were arrived at and a supplemental agreement drawn up providing that the contractor should not furnish and deliver any more candles, and that the United States should pay the contractor the sum of \$58,526.94. The proposed agreement is dated March 29, 1919, and at that time stearic acid of which the claimant had large quantities on hand showed a loss when its market value was compared with the price which the claimant paid for it. Since that date the market value of stearic acid has increased and at the time of the hearings before this Board the claimant waived its right to reimbursement in respect to stearic acid and now claims only for the loss on candle boxes, strap iron, candle paper and candle wick, amounting to \$14,022.62, all of which it had purchased for the purpose of performing contract 14353.

13. The proposed settlement was not satisfactory to the Board of Review for the reason that the contract might have been cancelled on December 16, 1918, by giving 15 days' notice, and in that event the United States would have been under no obligation except to receive and pay for such number of candles as the Standard Oil Co. would have produced during the 15 days succeeding December 16, 1918. Following this decision of the Board of Contract Review the cancellation notice of May 6, 1919, was sent to the claimant.

14. The question before the Board is as to the effect of the cancellation notice of May 6, 1919, taken together with the request made by the United States on the claimant to suspend production and

agreed to by the claimant on December 16, 1918. We believe that the only method in which the intention of the parties can be carried out and the rights and obligations of both sides maintained is to consider the cancellation notice of May 6, 1919, as taking effect as of December 16, 1918. It was issued *nunc pro tunc*. In giving effect to the cancellation notice as of December 16, 1918, there would have followed 15 days in which the claimant might have produced candles under the contract, but inasmuch as, by the request of the Government and by agreement of the parties further production of candles was suspended, this Board holds that there exists an agreement to suspend and to negotiate in respect to the 15 days' production, and that such an agreement being in existence a settlement agreement should now be negotiated between the United States and the contractor.

15. The amount to which the Standard Oil Co. is entitled is to be determined in accordance with the provisions of the supply circulars of the War Department and would be based on the number of pounds of candles the claimant would have manufactured during the 15 days following December 16, 1918, if it had continued to make candles and continued to use the organization and the employees that were on that date engaged in candle making, less the cost of production during that period.

16. The claimant changed its position at the request of the United States from that of a contractor who had the right to manufacture candles for 15 days and to compel acceptance and payment therefor to that of a contractor who agreed to suspend production and negotiate for a settlement. The claimant discharged its employees, disrupted its organization, and placed itself in a position where it was unable to manufacture candles in any such quantities as it could have manufactured them at the time of the agreement for suspension of production. The United States can not be permitted under such circumstances to profit by reason of the change of position of the claimant, inasmuch as the change of position was due to the request of the United States.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for appropriate action.

Col. Delafield, Mr. Patterson, Mr. Henry, and Mr. Hamilton concurring.

Case No. 2297.

In re **CLAIM OF THE BLOCH CO.**

1. JURISDICTION OF SECRETARY OF WAR—UNLIQUIDATED DAMAGES.—

The Secretary of War has no jurisdiction to adjust a claim upon a validly executed contract, for unliquidated damages arising from delay in performance caused by the Government, where the contract has been performed and claimant has been paid the amount provided in the contract.

2. CLAIM AND DECISION.—Claim under act of March 2, 1919, Form A, for damages caused by Government's delay in performing a formal contract. Held, no informal contract established. Held further, claimant is not entitled to relief either under that act or under General Order 103.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Director of Purchase, on a claim for \$10,223.33. Statement of claim, Form A, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17 (1919), by reason of an informal agreement alleged to have been entered into between the claimant and the United States.

2. A formal contract, No. 129, was entered into between Col. A. D. Knistern, Quartermaster Corps, and the claimant under date of January 7, 1918, for the manufacture of approximately 70,700 woolen service coats. The contract was fully performed by the claimant, and the contract price has been paid to it by the Government.

3. The claim presented is for unliquidated damages growing out of the delay of the Government in delivering the materials which under the terms of the contract it was required to furnish to the manufacturer.

DECISION.

1. It does not appear that there was any agreement entered into between the Government and the claimant other than the formal contract, which has been fully performed.

2. Inasmuch as no informal contract is established, claimant is not entitled to relief under the act of March 2, 1919.

3. Nor is claimant entitled to relief under General Orders, No. 103. Its claim being entirely for unliquidated damages, and the contract having been fully performed, the Secretary of War has no further jurisdiction of it, and any claim thereon must be settled in the Department of the Treasury. (U. S. Comp. Stats. 368.)

DISPOSITION.

An order will issue from this Board denying relief.
Col. Delafield and Mr. Price concurring.

Case No. 1549.

In re CLAIM OF WEST & DODGE CO.

1. **INTERFERENCE WITH ANOTHER'S CONTRACTS—TAKING OVER OF MATERIALS.**—Where the United States Government orders a contractor to stop work on a contract for the British Government and takes possession of the articles in process, there arises an implied agreement under the act of March 2, 1919, by which the United States is obligated to pay for the articles at a fair valuation.
2. **FAIR VALUATION—ARTICLES IN PROCESS UNDER A CONTRACT.**—Under such circumstances a fair valuation is the cost of the articles in process, plus the percentage of profit claimant would have made on the contract which was interfered with, in this case 25 per cent.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for \$6,711.27 the cost of screw gauges in process, plus a 25 per cent profit. Held, claimant is entitled to amount claimed.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$6,711.27, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. In July, 1917, claimant company entered into a written contract with His Britannic Majesty's Government for the manufacture of British screw gauges, and during the month of February and the early part of March was engaged in the manufacture of screw gauges for the British Government, and had in process a large number of these gauges.

3. On October 18, 1917, A. C. Downey, captain, Signal Corps, United States Army, gave the claimant company an order for screw gauges to be manufactured for the United States Government (order No. 30023 Aero).

4. Later, and in the months of January and February, 1918, the United States Government required the entire output of claimant company, and in the latter part of February Maj. H. W. Torney, Signal Corps, United States Army, Chief of the Gauge Section of the Signal Corps, instructed Mr. Edward T. Manning, one of his in-

spectors of airplane and airplane engines, Signal Service at large, to notify claimant company that they would have to furnish the United States Government with their entire production. (Tr. p. 28.)

5. Later, Maj. Torney ordered Mr. William F. Dodge, treasurer of claimant company to stop work on all gauges under the contract with His Britannic Majesty's Government, and to put all their production on United States Government orders. (Tr. pp. 30, 31.)

6. About that time Mr. Manning, under instruction of Maj. Torney, removed all of the material in process for the British Government from the benches of the workmen in claimant's shop, packed this material in boxes and stored them under the benches.

7. On April 22 Mr. Manning reported to G. G. Fleming, district manager of field investigations, as follows:

* * * * *

"3. The writer personally took these gauges from the workmen's bench and had them put in boxes and stored away."

8. On July 30, 1918, the contract between claimant company and His Britannic Majesty's Government for the British screw gauges was cancelled by the British War Mission for nondelivery.

9. At the time of the cancellation of the contract with His Britannic Majesty's Government claimant company had expended on partly finished products sums of money as follows:

Material	\$201. 52
Labor	2, 519. 76
Overhead	2, 519. 76
	<hr/>
	5, 241. 04

as shown by the inventory and audit and verification of the company's records by Mr. F. B. Kiefaber, accountant in the Bureau of Aircraft Production.

10. In its contracts with the United States Government the prices for gauges allowed contractor were upon the basis of cost-plus. Mr. Dodge, of claimant company, testified as follows:

"Mr. DODGE. Colonel, I think, due to the fact that we are not putting in any claim for estimated profits that we could have made on the job, if you please, and that the Signal Corps allowed us 25 per cent profit on the gauges that we made; I think, Colonel, if you please, that we should be entitled to the 25 per cent."

11. Under the contract with His Britannic Majesty's Government claimant company was making in excess of 25 per cent profit on all its work. (Tr. p. 17.)

12. On October 9, 1919, all of the gauges in process for the British Government were delivered to and accepted by the United States Government. (Claimant's Exhibit No. 8.)

DECISION.

1. This Board is of the opinion that when the United States Government, by its duly authorized representative, Maj. H. W. Torney, ordered claimant to stop work on the British War Mission order, an implied contract arose between claimant and the United States Government whereby the United States Government was obligated to purchase the material in process at its fair valuation to the claimant. This fair valuation is the cost to date plus the percentage of profit it would have made on the contract with His Britannic Majesty's Government had it been completed. Claimant is willing to accept 25 per cent, which in the opinion of this Board is well within the percentage of profit which claimant was making on its contract with His Britannic Majesty's Government.

2. The implied contract entered into at that time was confirmed by the United States Government when it accepted from the claimant company the partly finished gauges in process for the British Government.

DISPOSITION.

1. This Board will make and transmit a document setting forth the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Air Service, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, 1919, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Smith concurring.

Case No. 2040.

In re CLAIM OF UNIVERSAL MACHINE CO.

1. **CONSTRUCTION OF CONTRACT—SPECIAL FACILITIES.**—Where the termination clause in a formally executed contract provided for reimbursement for expenditures “other than expenditures for plant facilities and equipment provided for the performance of this contract” claimant is not entitled on suspension of contract to reimbursement for special tools, patterns, dies, and jigs provided by claimant for the performance of its contract.
2. **RE-FORMATION OF CONTRACT.**—Where a contractor seeks re-formation of a contract on the ground of mistake, the contractor must show that the mistake was mutual.
3. **CLAIM AND DECISION.**—Petition under General Order 103 presenting a claim disallowed by Air Service Claims Board for the value of special tools provided by claimant for the performance of a formally executed contract for trigger motors and gun-control rocker shafts. Relief denied.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Air Service Claims Board, United States Army, on a claim for \$518.80 on a formally executed contract under the following circumstances:

2. On October 29, 1918, the Bureau of Aircraft Production issued order No. 750128 for the following items: 750 trigger motors, at \$30 each, amounting to \$22,500; 250 gun-control rocker shafts, at \$30 each, amounting to \$7,500; making a total of \$30,000. This order stated that “Form 6A, contract No. 5226, will follow.”

3. On November 1, 1918, a formal production contract was entered into by Capt. F. D. Schnacke, Air Service, Aircraft Production, a duly authorized contracting officer, Bureau of Aircraft Production, and claimant, by its president, Columbus O'D. Lee.

4. Article V, section 2, of this contract provides that the same may be terminated by the Government if, in the opinion of the Director of Aircraft Production, the public interest shall so require, and subsection B of section 2 reads as follows:

“The United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expenditures

for plant facilities and equipment provided for the performance of this contract) made by the contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work, the delivery or performance of which is so terminated, plus ten per cent of the amount so ascertained."

5. From section 2, Article V, of this formal contract clause D was deleted, prior to its execution by both parties, by striking out the following words:

"The United States shall also pay to the contractor on account of depreciation or amortization of plant, facilities, and equipment, solely provided by the contractor at its expense for the performance of this contract, an amount to be determined as follows: As soon as conveniently may be done after such termination of this contract, the fair market value of such plant, facilities, and equipment at the time of such termination shall be determined by an appraisement to be made by three appraisers, one to be appointed by the contractor, one by the contracting officer, and the third by these two. The United States shall then pay to the contractor such part of the amount by which the cost to the contractor of such plant, facilities, and equipment shall exceed such appraised fair market value thereof as shall be fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated; and in determining what amount is so fairly and properly apportionable due regard shall be had to the extent to which the cost of said plant, facilities, and equipment should be regarded as having been absorbed by such performance. The amount so fairly and properly apportionable shall be determined by agreement between the contractor and the contracting officer, if possible, and in the event of their failure to agree shall be determined by three persons, one to be appointed by the contractor, one by the contracting officer, and the third by these two."

6. On November 23, 1918, Aircraft Procurement telegraphed claimant as follows:

UNIVERSAL MACHINE COMPANY, *Baltimore, Md.:*

Stop production on order seven five naught one two eight for trigger motors and gun control rocker shafts and incur no further expenses therewith. Acknowledge receipt.

AIRCRAFT PROCUREMENT—DOWNEY.

7. The subject of the appeal of claimant here is a request that clause D of section 2 of Article V, above quoted which was deleted prior to the execution of the written contract, will be reinstated in said contract by this Board.

8. The contention of claimant, as ascertained from its claim filed herein, is as follows:

"At the time the contract was signed it was our opinion that this clause covered only necessary machinery, and as we had a thoroughly equipped factory we duly executed same with this clause eliminated. We now find, after presenting our claim to the Air Service Claims

Board, a copy of which is attached herewith, that they have interpreted the clause D, in section 2 of article 5, to include special tools necessary to make the parts interchangeable with our product and the product of others, such as drill jigs, milling fixtures, etc., which are of no use for any other purpose and which the Government could remove from our factory at any time they pleased and give others to use in duplicating orders, and were absolutely necessary for us to make in order to fulfill the contract as per blue prints and specifications furnished, which cost \$468.91, plus 10 per cent profit allowed us under the contract, making a total deduction from our claim of \$515.80. By so doing they have not held to the original order No. 750128 given our representative on October 29, which stated that we were permitted to make a reasonable profit, as with this item disallowed from our contract we not only do not make the 10 per cent allowable by the Government, but are put to an actual loss of \$218.75, and the item that they disallowed (the special tools required for making these parts interchangeable) were just as much a part of the contract itself as the trigger motors and the gun control rocker shafts which we were to make."

DECISION.

1. The Board is of the following opinion:
2. Neither the contract nor the order contains any reference to special tools, patterns, dies, jigs, etc.
3. The contract was suspended by telegram of Aircraft Procurement, dated November '23, 1918. Section 2 of article 5 of the contract reads, in part, as follows:

"If, in the opinion of the Director of Aircraft Production, the public interest shall so require, this contract may be terminated by the United States by ten days' notice in writing * * *. In the event of and upon termination of this contract prior to completion as provided in this section for any reason other than the default of the contractor, the United States shall make payment to and protect the contractor as follows: (a) The United States shall pay to the contractor the contract price or compensation not previously paid for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination become effective; (b) the United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expenditures for plant facilities and equipment provided for the performance of this contract) made by the contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work, the delivery or performance of which is so terminated, plus ten per cent of the amount so ascertained."

4. Reimbursement for special tools, etc., can not be implied from the language in subsection (a), above quoted, because this clause clearly refers to the articles "manufactured in accordance with the requirements of the contract," viz, trigger motors and gun-control rocker shafts.

5. Neither can such reimbursement be inferred from subsection (b), above quoted, which provides for a pro rata reimbursement of expenditures of the contractor, "other than expenditures for plant facilities and equipment provided for the performance of this contract," because considering the language of the contract and its object, and in the light of all the facts herein presented, this Board holds that special tools, patterns, dies, jigs, etc., must be included in the phrase "equipment provided for the performance of the contract."

6. This decision is based on the fact that the termination clause of this contract expressly provides for a certain kind of reimbursement, and that from the language used, it can not be held to include special tools, etc.

7. This case is to be distinguished from the case of a contract containing no termination clause or the case where the termination provisions are silent as to reimbursement. In such a case, special tools adapted solely to the production under the contract and applicable to the whole contract, are to be considered as facilities or equipment, and the unabsorbed amortization paid by the Government. (Notes on jurisdiction of the Secretary of War to settle contracts, etc., Sept. 8, 1918, p. 12, D.)

8. There was no mutual mistake in the execution of this contract with clause D of section 2 of Article V deleted such as would give the Secretary of War jurisdiction to re-form.

9. For the foregoing reasons, therefore, this claim is denied.

DISPOSITION.

1. A final order denying relief will issue.
Col. Delafield and Mr. Averill concurring.

Case No. 661.

In re CLAIM OF E. C. GATLIN IMPORTING CO.

1. **QUARTERMASTER GENERAL'S PURCHASE ORDER, FORMAL CONTRACT OF.**—When purchase orders for goods of less value than \$25,000, for immediate delivery, are issued by authority of the Quartermaster General, they become formal contracts under Compiled Statutes, section 6853b, and the Regulations of the Quartermaster General. (Q. M. G. Notice No. 28, July 19, 1918; Q. M. G. Notice 189, Oct. 15, 1918.)
2. **UNLIQUIDATED DAMAGES—JURISDICTION—TERMINATION OF CONTRACTS.**—Where goods specified in such Quartermaster General's purchase orders are delivered and paid for, the contracts are terminated, and this Board can make no award on the basis of such contracts for unliquidated damages.
3. **PAYMENT—DELAY IN.**—Where the Government delays payment for goods delivered to it under purchase orders for a period not anticipated by the contractor, the Government is not liable for damages or interest on account of such delay.
4. **SALES—DELIVERIES.**—Where purchase orders required delivery f. o. b. at a certain point, the Government is not obligated to accept at such point in order to make immediate payment therefor, where chemical tests by analyses are necessary, and though shipped from the delivery point on Government bill of lading, such shipment does not constitute an unqualified acceptance by the Government, as such title only passes to it as was subject to rejection, if when inspected the goods did not comply with the specifications.
5. **ESTOPPEL IN PAIS.**—Where claimant continued to enter into contracts with the Government and accepted purchase orders for articles produced by it, notwithstanding the fact that the Government was slow in making payment on previous deliveries, such conduct on claimant's part estops it from claiming damages on account of delays in payment.
6. **CLAIM AND DECISION.**—Claim under General Order 103 for damages on account of delay in payment for goods. Held, claimant not entitled to recover.

Mr. Harding writing the opinion of the Board.

This claim comes to us on appeal from the Classification Board, Settlements Division, Office of Director of Finance, which denied the claim of the claimant in the sum of \$10,092.99. The claimant claims this amount in the alternative on account of the delay of the Government in paying it on account of the contracts hereinafter set forth :

1. For damages caused it by delay in the payments.
2. If not allowed as damages then it should be permitted to add that amount to its selling price, the same being 10 per cent thereof.

FINDINGS OF FACT.

1. Between the dates of September 4, 1918, and November 21, 1918, both dates inclusive, the claimant submitted to the office of the quartermaster at St. Louis, Mo., six proposals for furnishing to the Government lemon extract and vanilla extract in bottles containing different quantities and at different prices. The claimant was in business at Kansas City, Mo.; deliveries were to be made according to the proposals f. o. b. shipping point, packed in domestic cases, marked according to instructions contained in purchase orders, and shipped to such places as directed. It was provided in the Government circular, upon which the proposal was made in each case, that a formal written contract would be executed in each case where the supplies purchased amounted to \$25,000 or more, and in each proposal there was a fixed price for the articles purchased and to be furnished, but which price was not the same in all of the proposals. No one of these proposals was accepted by the Government in the precise terms offered.

2. Between the dates of October 4, 1918, and December 2, 1918, the Government issued against each of these proposals purchase orders for a fixed amount of the goods offered and at the price offered, and requiring them, as provided in the proposal, to be shipped to points within the United States. All of the purchase orders provided for f. o. b. delivery to Kansas City, Mo., and that shipments were to be made on bills of lading furnished by the Government. The points to which the goods were to be shipped were sometimes near by and sometimes a great distance from the shipping point. For instance: Some were to be shipped to St. Louis, Mo.; some to El Paso, Tex.; some to Chicago, Ill.; some to Omaha, Nebr.; some to New Orleans, La.; some to Fort Sam Houston, Tex.; some to New York City; some to Newport News, Va.; and some to Baltimore, Md., as well as to other points. At the time of these shipments there were in force in the Quartermaster's Department orders requiring goods of this kind to be inspected and sampled at the point of destination before acceptance thereof by the Government. The goods under the above purchase orders were shipped by the claimant during the months of October, November, and December, 1918, and January and March, 1919. The Government vouchers sent to the claimant in payment of these shipments were dated in November and December, 1918, and January, February, and March, 1919.

3. Only one of the purchase orders in question amounted to more than \$25,000, and to cover that amount a formal written contract was entered into between the claimant and the United States represented by Major R. Field, Quartermaster Corps, St. Louis, Mo. All

of the other purchase orders, covering the entire amounts bought from time to time by the Government from the claimant, were separate contracts for varying amounts of goods, dated at different times, all being for immediate delivery, each of them being for less than \$25,000. All of them prior to November 12, 1918 were signed by Major Asa Irwin, Quartermaster Corps, of the St. Louis Quartermaster Depot, on behalf of the Government.

4. A number of the purchase orders were issued after November 12, 1918, some of them being proxy signed for, and some of them regularly signed by Major Asa Irwin, Quartermaster Corps, each being for immediate delivery and each being for less than \$25,000. Whether said purchase orders were issued prior to November 12, 1918, or afterwards, each one of them upon it being accepted and complied with by the claimant was a separate contract for the goods furnished. All of the purchase orders were filled by the claimant, the goods shipped as directed thereunder, and the claimant was paid from time to time by the Government in checks representing the amount of each shipment under the purchase orders in question; so that all of the goods to be received by the Government from the claimant have been received and all of the money due the claimant by reason thereof has been paid and receipted for by the claimant, amounting in all to \$100,929.96.

5. The claimant claims that the goods being by the terms of the separate contracts deliverable f. o. b. Kansas City, Mo., the amount due it under the contracts became payable at Kansas City, Mo., immediately upon delivery, and that the Government by providing delivery at Kansas City, Mo., was bound to a full acceptance at that point and became bound to have the goods analyzed, tested, and inspected at the f. o. b. point, if the Government desired to have it done at all. and the damages claimed by the claimant, it is asserted, were caused by nonpayment having been made at or about the time of shipment, or rather because payments were delayed after shipment and until such time as the Government could inspect, analyze, test, and accept the goods at points of destination.

It nowhere appears in any of the contracts or in any of the papers presented by either party that any time of payment was fixed. Though claimant had just finished a contract with the Government for similar goods during which it testified payments were promptly made, it alleges that before any of the proposals from it to the Government were made it was advised that the Government was slow in the payment of its bills, and that therefore it talked with Maj. Irwin on the subject, and Maj. Irwin assured the claimant that it would be promptly paid. And as tending to prove claimant's assertion it

placed in evidence a paper in the handwriting of Maj. Irwin, undated and unsigned, reading as follows:

"I certify that this bill is correct & just and that payment therefor has not been received.

"Copy from Maj. Irwin."

E. C. Gatlin, the president of the claimant, insists that this paper was furnished to him before his company made any proposals at all to furnish the Government with the goods in question, and that Maj. Irwin assured him that if it, the claimant, would write the substance of the memorandum on each of its invoices the bills would be promptly paid upon receipt at the quartermaster's office in St. Louis, Mo. The effect of the testimony of Maj. Irwin is that so far as he recollects the paper was furnished to the claimant's president after the contract had been partly, perhaps largely, performed, and that it was given to him simply to save the time that would be saved by not having to transmit the invoices backward and forward between Kansas City, Mo., and the quartermaster's office at St. Louis, Mo. It also satisfactorily appears from the evidence that from time to time at the request of the president of the claimant Maj. Irwin took such steps as he could take to hasten Government checks to the claimant on account of the insistence of claimant's president.

DECISION.

1. It appears from the findings of fact that the only item of over \$25,000 upon which claimant bases a part of its claim was concluded in a formal written contract. It also appears from the findings of fact that all of the purchase orders issued to the claimant prior to November 12, 1918, were each for immediate delivery and for an amount less than \$25,000, and, therefore, each one of them, under the regulations of the Quartermaster General (Q. M. G. Notice No. 28, July 19, 1918; Q. M. C. Notice No. 189, Oct. 15, 1918), became a formal written contract under the Revised Statutes of the United States. All of the amounts having been paid upon such contracts, and all of the goods having been furnished under them, so that they are terminated, the Secretary of War and this Board have no jurisdiction to consider them further or to make any award whatever on the basis of the contracts on account of unliquidated damages.

The same must also be said of the regularly signed contracts issued by the Government to the claimant after November 12, 1918; they having been completed and terminated there is no jurisdiction in the Secretary of War or in this Board to deal with them.

As to the purchase orders issued after November 12, 1918, and proxy signed, it need only be said that the act of March 2, 1919, by

its very terms excludes them from the jurisdiction of this Board. This comprehends all of the dealings between the claimant and the United States and leaves no claim in its favor with which the Secretary of War or this Board can deal.

2. We might rest the decision on the above paragraph wholly, because, whatever else may be said, relief to this claimant can not be granted. However, in order that the decision may not rest altogether on the interpretation of the law, we have looked into the facts of the case carefully, and without going minutely into the evidence, we find, and so hold, that the mere fact that the goods and the purchase orders issued required delivery f. o. b. Kansas City, Mo., did not obligate acceptance by the Government at that point nor payment at that point immediately upon delivery there. It must not be forgotten that these goods were bottled goods; they were goods subject to chemical tests by analysis, and the Government was not obliged in law to accept them until it ascertained, by such tests as were necessary for that purpose, that the quality and amount of the goods were according to specifications. Were it otherwise, and should it be decided that delivery to the Government f. o. b. shipping point and shipment on bills of lading of the Government constituted acceptance, then the Government would be without any remedy except as upon breach of contract by the claimant if found that the goods were not according to specifications. Neither private dealers nor the Government deal in any such way with goods of the kind in question. While these goods were shipped from Kansas City, Mo., at the risk of the Government and on Government bills of lading, only such title passed to the Government as was subject to rejection if, when inspected, they were found not to be in accordance with the specifications. This is the general rule with reference to goods sold by sample.

It appears that there were some delays in sending some of the checks for payment to the claimant, but a complete inspection of the dates of shipment, the distance that the goods had to travel, the necessity for inspection, the dates of the reports of inspection, the dates of the checks, and the time taken for them to reach the claimant from the point of transmission does not evidence such delay as should penalize the Government; especially as there never was any contract between the parties as to the date of payment.

The evidence shows that while the claimant was dissatisfied with the alleged slowness in getting its pay from time to time, and while this alleged slowness existed all of the time that its various contracts were being performed, it nevertheless accepted the situation, and in spite of its apparent dissatisfaction ratified its acceptance of the situation by continually putting in new bids and taking new contracts.

Neither is there any rule of law known to this Board by which failure to pay money within a given time either allows the claimant to assess unliquidated damages to any amount against the debtor or to add the same amount as liquidated damages to the price of its goods. It is a general rule that damage for nonpayment of money when due is the interest on the money from its due date. It can not be said in this case that the Government was unreasonably dilatory. The claimant's real difficulty came from trying to do over \$100,000 business in about six months with only \$8,000 or \$10,000 working capital. It would be a rare accomplishment to turn over working capital something more than ten times in six months.

The decision of the Classification Board, Settlements Division, Office Director of Finance disallowing the claim is affirmed, and the claim is disallowed.

DISPOSITION.

The claim is disallowed.

Col. Delafield and Mr. Howe concurring.

Case No. 360.

In re CLAIM OF J. THOMPSON RIDAY & SON CO.

1. **FORMAL CONTRACT—OVERRUN.**—Where claimant in manufacturing a certain article, for the Government, under formal contract at a certain unit price and said contract provided for an overrun of 5 per cent on the total number of articles required to be produced, and said amount of overrun was delivered to and accepted by the Government, the claimant is entitled to be paid for same at the unit price named in the contract.
2. **OVERRUN ACCEPTED BEYOND CONTRACT ALLOWANCE.**—Where the Government accepts an overrun on a formal contract greater than that allowed by its terms, the surplus over the average allowed by the contract should be paid for at the contract price by the issue of a certificate of fair value.
3. **CLAIM AND DECISION.**—Claim is presented as a Class B claim, but should be treated under the provisions of General Order 103, and is based on formal contract for an overrun of articles produced under the contract. Held, that claimant is entitled to relief, and is entitled to be paid for the overrun provided by the contract, the same being 80,012 powder bags, and held further that this Board recommends certificate of fair value issue for the additional powder bags, to wit, 23,194, at the rate of \$4 per thousand.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is erroneously presented as a Class B claim, for the sum of \$414. It should, however, be handled under the provisions of General Order 103, War Department, 1918, and arises under the following circumstances:
2. On the 9th day of October, 1918, the United States Government entered into a validly executed contract with J. Thompson Riday & Son Co., numbered P-16182-2643TW, for the manufacture of 1,600,240 powder bags for 3-inch Stokes trench-mortar shells at \$4 per thousand, f. o. b. contractor's plant, Philadelphia, Pa.
3. By the terms of said contract, the contractor was allowed a 5 per cent plus or minus average.
4. The company at the request of United States Inspector J. W. Ball, completed the contract by a 24-hour run, and in so doing had an overrun of 103,206 trench-mortar powder bags.

5. Thereafter on May 22, 1919, these 103,206 bags were delivered to and accepted by Major Arthur L. Lemon, Quartermaster Corps. Letter of Maj. Lemon, dated January 20, 1920, reads as follows:

"1. Relative to paragraph two in cover letter, you are advised that records of this office show receiving and shipping reports serial No. 1, covering the receipt and shipment of one (1) case, containing 103,260 silk ballistite powder rings (completed), weighing 81 pounds, and representing 860 square yards of fabric, received from J. Thompson Riday & Sons Co., warehouse No. 248, on their contract P-16182-2643TW, and shipped to Daniel I. Murphy, 234 North Front Street, Philadelphia, Pa., on authorization from storage and scrap manager, Philadelphia District Ordnance Office, dated 3-21-19, district serial No. 1875. Shipping tickets were executed June 11th, 1919."

6. Contractor has been paid in full for the entire amount of the original contract, to wit, 1,600,240 powder bags, and now asks for payment on the 103,206 bags overrun, which were delivered to the Quartermaster Corps, United States Army.

DECISION.

1. This Board finds under the formal contract entered into between the Government and the claimant that claimant is entitled to be paid for 80,012 powder bags, this being the overage provided for in said contract.

2. As the additional 23,194 bags were delivered to and accepted by the Government at the same time the 80,012 bags were delivered and accepted, this Board recommends that a certificate of fair value issue for the additional bags, i. e., 23,194, at the rate set forth in the original contract, viz, \$4 per thousand.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Ordnance Department, for proper action. Col. Delafield and Mr. McCandless concurring.

Case No. 1477.

In re **CLAIM OF A. E. LITTLE CO.**

- 1. TERMINATION CLAUSE—SETTLEMENT—RIGHTS OF PARTIES.**—Where a formal contract containing a termination clause is terminated in compliance therewith, the contractor is not entitled to reimbursement for items not mentioned in or contemplated by such termination clause.
- 2. CLAIM AND DECISION.**—This claim for \$855.95 is an appeal from the ruling of the Chemical Warfare Service denying items therein amounting to \$620.28. The claim is based on the termination of a formal contract. Held, that items only that were contemplated by the termination clause can be considered in the settlement of a terminated contract, and that the decision of the Chemical Warfare Service should be affirmed.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a ruling of the Chemical Warfare Service denying a portion of claimant's claim under a terminated formal contract. The contract is No. GD-1697 of the Chemical Warfare Service calling for the delivery to the United States of 7,000 trench fans.

2. The contract by its termination clause permitted the United States to terminate the contract at an time, for any reason, by notice in writing. Taking advantage of this clause shortly after the signing of the armistice, the United States did notify the contractor of its desire to terminate the contract, and claim was submitted by the contractor for materials on hand as one item of claim, and a further claim of carrying charges on this plant and storage and insurance of Government materials. The Chemical Warfare Service has denied relief to claimant on this latter claim and claimant has refused to accept settlement on any part of his claim bringing the entire settlement to this board on appeal.

3. The termination clause in the contract, providing for the basis of settlement in case of termination, is as follows:

"(a) The United States shall accept from the contractor all articles or services which shall have been completed in accordance with

the terms of this agreement at the expiration of fifteen days after the receipt of the aforementioned notice.

"(b) The contractor shall not, after the receipt of the aforesaid notice of termination, put into process any materials which will not be manufactured into completed articles as called for hereunder before the expiration of the fifteen days as above provided, and shall not purchase or obligate himself for any additional materials.

"The contractor may, within sixty (60) days after the receipt of the notice of termination, dispose of any or all raw materials, parts or supplies provided by the contractor to be used expressly and exclusively for the production of the articles herein called for at a price satisfactory to the contracting officer and the United States shall, in that event, reimburse the contractor for any proven loss of money which he may have suffered thereon."

DECISION.

1. The supply circulars of the Purchase, Storage and Traffic Division direct that whenever a contract provides that it may be terminated by the United States the termination may be effected and settlement made only in accordance with the provisions of such termination clause. The contractor was aware that this contract might be terminated at any time by the United States, and of the basis upon which the adjustment would be made in the event of such termination and it must be presumed to have had this in mind both when the contract price for the articles was fixed and during the course of the performance of the contract itself. No items not contemplated by the termination clause can now be considered, therefore, in the settlement of this contract. The decision of the Chemical Warfare Service is therefore affirmed.

DISPOSITION.

1. A copy of this decision will be transmitted to the claimant and another copy together with the file forwarded to the Bureau Claims Board for the settlement of this case in accordance with the provisions of the supply circulars of the Purchase, Storage, and Traffic Division and of this decision.

Col. Delafield and Mr. Henry concurring.

Case No. 2247.

In re **CLAIM OF ANNISTON STEEL CO.**

- 1. REJECTED ARTICLES DESTROYED.**—Where, under a contract providing for the inspection of manufactured articles and rejection of those found to be defective (the decision of the Chief of Ordnance or his representative to be final), an inspector rejects certain articles and an appeal is taken to higher authority, but the articles are destroyed by claimant, there can be no recovery for such destroyed articles because at a subsequent date the representative of the Chief of Ordnance lays down a standard under which such articles would probably have been accepted.
- 2. RECOVERY FOR REJECTED ARTICLES IN EXISTENCE.**—There can be no recovery for existing articles rejected within the terms of the contract in accordance with the decision of the representative of the Chief of Ordnance.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1918 based upon an informally executed contract for the manufacture of steel rims. Held, claimant is not entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Ordnance Department, affirming a decision of the Cincinnati Ordnance District Claims Board on a claim for \$11,329.78 on an informally executed contract dated April 17, 1918 for the manufacture of 6,000 rims for road track adjusting wheel part No. M-1471 at \$26.50 each (War Ord—P-6087-1222ME).

2. The contract in question required delivery of 400 rims in April, 1918, and proceeding after May 1, 1918, at the rate of 1,600 per month, all deliveries to be completed by August 31, 1918.

Article 2 of the contract relates to inspections and, amongst other things, provides:

“Whatever of the components, not furnished by the United States, or of the articles do not in all respects fulfill the requirements of this contract, shall be rejected, and the decision of the Chief of Ordnance as to the quality thereof shall be final. The Chief of Ordnance may require the replacement of all such components and articles so rejected, and the United States may withhold out of the payments to be made hereunder, an amount sufficient to cover the cost thereof until such proper replacement.”

Article 11 provides:

"Wherever the term 'Chief of Ordnance' is used in this contract the same shall be construed to include the Acting Chief of Ordnance or any person designated to act as the Chief of the Ordnance Department, United States Army, or any person who is accredited as his duly authorized representative."

3. In the staff report of the Cincinnati Ordnance District Claims Board the following appears:

"The contract calls for the completion of 6,000 by the end of August, 1918. Their performance on this contract was 927 by that date. In January, 1919 the progress record shows production of 4,070 and the report of February 13th the completion of 6,000, there being 1,930 rims accepted between January 30th and February 13th."

4. After the claimant got into production of the rims, it found that a large percentage of the rims produced were rejected by the Army Inspector of Ordnance at its plant. The claimant objected to the action of the Army Inspector of Ordnance, but in spite of these objections the Inspector refused to pass 687 rims which, together with other rims which the claimant admitted were bad, were finally scrapped and melted down by the claimant.

Thereafter the claimant set aside all rims that were rejected by the Government Inspector until it had on hand 2,221 rims which the Inspector had condemned. Finally, in December, 1918, the claimant with the assistance of the Army Inspector of Ordnance, selected from the 2,221 rims which had been rejected 3 rims, 1 representing the average best of the rims rejected, 1 representing the average poorest of the rims rejected, which the claimant thought should have been accepted, and 1 representing the average of rims rejected between the best and poorest. The claimant sent these three samples of rejected rims to the Engineering Division, Ordnance Department, at Washington, with the request that a ruling be made as to whether these rims, or any of them should be accepted by the Government.

On January 7 the three sample rims were inspected by Maj. Paul Weeks and Capt. H. C. Shafer. On January 11 the Motor and Carriage Branch of the Executive Section, Inspection Division, Ordnance Department, wrote the Army Inspector at claimant's plant as follows:

"1. Major Weeks, of the Engineering Division, and the writer have personally, on January 7, 1919, carefully gone over each of the three rim castings, Part M-1471, forwarded to the Washington representative of the Anniston Steel Company (Messrs. Reed & Kicker-nell), and you are directed as follows:

"Blowholes in the machined part of these castings were in no case serious, since this part is riveted solid to 2 $\frac{3}{4}$ " steel plate. The only serious blowholes would be such as would allow breakage of the rims while riveting.

"3. The outside surface of the rims, namely, the wearing surface, is the part where blowholes are objectionable. The samples of the best and second best rims are considered suitable for service. The poorest rim had a space about 10" long on the wearing surface that was so porous that it would very soon be worn flat. In other words, the metal at this point was so spongy that it would quickly flatten under the hammering effect of the track links passing over the rim as they do when the track is in service.

"4. It is, therefore, believed advisable to accept rims equal to the best and second best samples submitted. However, rims which are as porous as the third sample submitted should not be accepted."

5. Upon receipt of these instructions the Army Inspector of Ordnance reinspected the 2,221 rims which he had previously rejected, and out of them accepted 2,003 rims, leaving 218 finally rejected.

Of these 218 rims finally rejected after reinspection 83 were completed and 135 had not yet been machined. The claimant makes claim for \$14.08 each for the completed 83 rims and \$12.25 each for the uncompleted 135 rims, together with a claim for \$26.50 each for two-thirds of the 687 rims, or 458 rims, which had previously been rejected, and which were melted down by the claimant. On account of the refusal to allow this claim, the claimant has appealed to the Board of Contract Adjustment.

6. On January 11 the claimant was sent a notice requesting it to suspend further operations on its contract, which it agreed to do, but the claimant was permitted to continue work for 30 days, during which time the Government passed 2,003 rims on reinspection. The claimant sought to apply most of these rims to another contract which had been given it on October 1, 1918, five and a half months after the contract in question, but the Cincinnati District Ordnance Office directed claimant to apply 1,930 rims to the first contract, thus completing the total of 6,000 rims called for by it.

7. At the hearing claimant contended that the inspector had improperly rejected the 687 rims which were then melted down, and that under the instructions of January 11, 1919 issued some months later, at least two-thirds of the 687 rims would have been acceptable, and so the claimant should now be paid the full contract price of \$26.50 as the value of the rims that were rejected and are not now in existence. The claimant also contends that the fact that the District Ordnance Office required claimant to apply the 1,930 rims to its contract dated April 17, 1918 which required deliveries to be completed on August 31, 1918, instead of to its contract of October 1, 1918, should not preclude the claimant from recovering on its claim because the full amount of 6,000 rims has been delivered under the first contract.

DECISION.

1. The contract in question provides for the inspection of rims to be manufactured and for the rejection of those that do not fulfill the requirements of the contract, with a further provision that the decision of the Chief of Ordnance as to the quality thereof shall be final. In another paragraph of the contract the term "Chief of Ordnance" is construed to mean any person who is accredited as his duly authorized representative. So long as the 458 rims for which the claimant now seeks payment at the contract price were in existence and before they had been melted down by the claimant, the Army Inspector of Ordnance had rejected them, and no appeal had been taken from his decision. In the performance of his duties as Inspector it was incumbent upon the Inspector to use his judgment and discretion as to what rims came up to the requirements of the contract, and unless set aside by higher authority the decision of the Inspector was final. No appeal was taken from his decision while the rims were in existence, and the mere fact that he now makes affidavit that he would have passed two-thirds of the 687 rims under the instructions given him on January 11, 1919, is immaterial. There is nothing in those instructions which makes them retroactive, and there is nothing shown in this record which relieves the contractor from the contract which it made whereby it agreed that the decision of the Chief of Ordnance or his duly accredited representative would be final.

The claimant could have kept the 687 rims which were rejected instead of scrapping them and could have then appealed to the Chief of the Inspection Division from the action of the Plant Inspector in condemning these rims, but it elected to treat them as finally condemned and proceeded to scrap and recast them. Even though it admitted that the Inspector, in the first instance, erred in his judgment and discretion in rejecting the 687 rims, still it must be admitted that under the terms of the contract his decision was final, and the Government was in no wise responsible for what is now claimed to be an error in judgment in condemning the rims. As there is nothing in the letter of instructions to the Plant Inspector dated January 11, 1919, which makes the ruling contained therein retroactive, we can see no basis on which it can be claimed that the ruling is to apply to rims which were then actually out of existence. Surely the Inspection Division at Washington had no power to amend the claimant's contract so as to pay it the full contract price for rims which were out of existence and which were never delivered to the Government. It is not believed that the office in Washington ever attempted so to do.

2. As the contract contains no provision for the payment to the contractor for rejected rims, we are unable to see any merit in this claim, either for the 458 rims which were rejected and out of existence before the new instructions issued from Washington to the plant inspector on January 11, 1919, or for the 218 rims which were finally rejected on reinspection after the receipt of the said instructions.

3. For the reasons stated the decisions of the Claims Board, Ordnance Department, and the Cincinnati District Ordnance Claims Board appealed from are affirmed and the relief sought for is denied.

Col. Delafield and Maj. Taylor concurring.

Case No. 1729.

In re CLAIM OF WATTS, STEBBINS & CO.

1. **FORMAL CONTRACT REJECTED BECAUSE OF CHILD-LABOR CLAUSE—OPERATION UNDER INFORMAL AGREEMENT.**—Where claimant entered into an agreement to furnish the Government with 2,732,000 yards of gauze at $10\frac{1}{4}$ cents a yard, and where the formal contract prepared pursuant to such agreement was not signed by claimant because it contained a child-labor clause not acceptable to two of the four mills under claimant's control, but where claimant proceeded to furnish the product of the two of its mills not objecting to the child-labor clause, which was accepted by the Government, there resulted an informal contract to supply the gauze, which was to have been made at those two mills at the price stated.
2. **CLAIM AND DECISION.**—This claim for \$3,408.51 arises under the act of March 2, 1919, and is presented upon the theory that it represents the loss sustained by claimant by reason of the suspension of the contract for the furnishing of a quantity of gauze. Held, that an informal contract was entered into between the claimant and the Government under which the claimant was to furnish a quantity of gauze, and that at the time of the suspension of the contract by the Government 380,639 yards of said gauze were left on claimant's hands for which claimant is entitled to compensation.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim arises under the act of March 2, 1919; statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17 of 1919 for \$3,408.51, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On September 24, 1918 the claimant entered into an agreement with the United States to furnish 2,732,000 yards of gauze, in gray, at $10\frac{1}{4}$ cents per yard, which quantity was subsequently partially covered by purchase orders. The proposed formal contract, prepared to effectuate the said informal agreement, was numbered 6438A, but was never signed, solely because a child-labor clause embodied in the instrument was not acceptable to two of the four mills, namely, Isaqueena Mills and Chadwick-Hoskins Mill, controlled by the claimant. The contract embodying said clause was,

however, acceptable to the other two mills, namely, Grendle Mills and Norris Mills, and production was accordingly continued by the two last-named plants, however, without signature of the formal contract by the claimant, but under the above-stated informal agreement.

3. The claimant had previously procured raw material and had arranged for the gauze to be manufactured in the following portions by the following mills:

	Yards.
Grendle Mills, Greenwood, S. C.....	1, 500, 000
Norris Mills, Cateechee, S. C.....	300, 000
Isaqueena Mills, Central, S. C.....	332, 000
Chadwick-Hoskins Mill, Charlotte, N. C.....	600, 000

and deliveries were made to the satisfaction of the Government and paid for up to the time of submitting said contract embodying the child-labor clause. Thereupon, two of the mills above mentioned, namely, Isaqueeena Mills and Chadwick-Hoskins Mill, ceased production in connection with this transaction and thenceforth pass out of consideration, no claim being made on their account. Deliveries of finished product were continued from the Grendle Mills and Norris Mills alone up to the date of suspension of the work on account of the armistice.

4. At the time of such suspension claimant had material left on its hands as follows:

	Yards.
Grendle Mills.....	261, 602
Norris Mills.....	119, 037

DECISION.

It is the decision of the Board that an informal contract was entered into on September 24, 1918, between the claimant and the United States for the furnishing of gray gauze, as mentioned, which was suspended by the Government during performance by the claimant, leaving on claimant's hands approximately 380,639 yards of said gauze, for which the claimant is entitled to compensation.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff.

Col. Delafield and Mr. Shaw concurring.

Case No. 1564.

In re CLAIM OF ENGLE & HEVENOR.

1. **CLAIM OF SUBCONTRACTOR.**—There can be no direct settlement of the claim of a subcontractor where there was no privity of contract between the Government and the subcontractor.
2. **JURISDICTION.**—Since the power of the Secretary of War to settle a formal contract by supplemental agreement depends upon the existence of the contract, the completion of the contract renders such settlement impossible.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, by subcontractor for the cost of repairs to certain of his machinery and equipment. Held, claimant is not entitled to relief.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. The claim is before this Board upon an appeal from the decision of the Director of Purchase denying claimant any part of the amount claimed. The claim is for \$1,303.75 and is to cover the cost of repairs to certain machinery and equipment.

2. The United States by Lieut. Col. R. C. Marshall, Jr., Quartermaster Corps, entered into a formal contract, No. 595-1, on the 13th day of March, 1918 with the Wells Bros. Construction Co. for the construction of Signal Corps warehouses at Middletown, Pa. The Wells Bros. Construction Co. in turn sublet by cost-plus contract, with the approval of the construction quartermaster, to Engle & Hevenor, the claimants herein, all work in connection with the tracks, switches, and grading required by the prime contract. The prime contract was completed in July, 1918, and the contractor paid in full, and the claimant herein, as a subcontractor, makes this claim for the cost of repairing and restoring to its original condition the machinery and equipment used by him in the performance of his subcontract.

DECISION.

1. The claim is submitted by a subcontractor who has never had any direct dealing with the United States. There never having,

therefore, been any privity of relation between the United States and the claimant, no adjustment of the claim can be made directly with him. In view of the further fact that the claim arises upon a formally completed contract, and the power of the Secretary of War to settle contracts by agreement with the contractor rests wholly upon the existence of the contract itself, the completion of that contract makes settlement by amendment no longer possible.

2. Aside from questions of jurisdiction and upon the merits alone, it would appear that claimant is not entitled to recover. The claim is for the cost of machinery claimed to have been damaged in performing the work under claimant's contract, but from claimant's own statement it appears that the only repairs required were made necessary by ordinary wear and tear and not by any act of the United States or of the prime contractor. This constitutes merely depreciation to equipment, an item of claimant's overhead which will be presumed has been paid to the contractor as part of his cost under the cost-plus contract under which he was performing this work. No part of the claim, therefore, can be allowed, and this Board will cause an order to be made and filed denying claimant any part of the relief sought.

Col. Delafield and Mr. Henry concurring.

Cases Nos. 332, 334, and 335.

In re CLAIM OF HENRY SONNEBORN & CO.

1. **EVIDENCE.**—Where claimant's witness testifies that a quartermaster officer made a certain oral agreement which that officer denies having made, and his denial is supported by circumstantial evidence, claimant has failed to establish the fact of an agreement.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral agreement. This Board decided, July 31, 1919, that claimant was not entitled to relief. Held, to the same effect on rehearing.

Mr. Hunt writing the opinion of the Board.

DECISION ON REHEARING.

This claim, for loss on materials alleged to have been purchased for the performance of certain clothing contracts, was denied by this Board on July 31, 1919, on the ground that the evidence showed the purchases were not made upon the faith of oral agreements between October 19 and November 2, 1918 as alleged by the claimant, but were made in anticipation of awards later recommended to the Board of Review, but never executed on account of the intervention of the armistice.

The claimant applied for a rehearing upon the ground that the said purchases were made upon the faith of an agreement made with Col. Hirsch and Col. Stogsdall, the Philadelphia Depot Quartermaster and his assistant, on or about October 4, 1917, alleging that these officers then and there agreed in substance with the claimant that it would be awarded contracts to the extent of 900,000 breeches, 900,000 blouses, and 800,000 overcoats.

On November 21, 1919, a hearing was afforded the claimant, at which the above-named officers and the claimant's witnesses appeared and testified. At this hearing the claimant withdrew its contention that Col. Stogsdall had participated in any agreement as alleged (Record, p. 7). Col. Hirsch denied that he ever made such an agreement and showed as circumstances tending to corroborate his statement that at the said time he was without authority to enter into further contracts (Record, p. 15), and was about to leave Philadelphia for other duties. Evidence to the contrary offered by the claimant was not sufficient to amount to a preponderance.

DISPOSITION.

No agreement as alleged having been shown, this claim must be denied.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 2311.

In re **CLAIM OF MORGAN LUMBER & MANUFACTURING CO.**

1. **TELEGRAPHIC ORDER FOR SUPPLIES.**—Where claimant, after submitting a bid, received a telegraphic order for field desks which, on account of the intervention of the armistice, was not followed by a formal contract, there was an agreement within the purview of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an express informal contract for medical field desks. Held, claimant is entitled to relief.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This is an appeal from a decision of the Claims Board, Director of Purchase, on a claim for \$571.11 on an informally executed contract under the following circumstances: The Claims Board, Director of Purchase, disallowed the claim on the ground that the evidence submitted did not establish that an agreement was entered into as alleged prior to November 12, 1918.

2. The claimant, following negotiations with Government officials, oral and by correspondence, upon the request of the Government, submitted on November 4, 1918, a bid for 2,000 field desks, No. 2, as per specifications, at the price of \$4.57 each.

3. On November 5, 1918 the claimant received a telegraphic order from the Field Medical Supply Depot, United States Army, for 2,000 field desks, which order was given in the following telegram sent by Lieut. Col. M. A. Reasoner:

“Advise number desks, field No. 2, you can accept, in addition to 2,000 stated in your bid, Circular 872. Also shipping date.”

On November 6 claimant replied by wire as follows:

“Labor and material conditions will not permit increasing our *award* now. Please forward to us plans and samples and arrange war order for transportation of raw material to our factory.”

On the same date, November 6, 1918, claimant wrote the Field Medical Supply Depot:

“We received your telegram late yesterday afternoon, asking us to advise how many additional field desks, No. 2, we could furnish

and the time required for shipment * * *. Together with our mill superintendent we have gone very thoroughly over the condition of material in stock at this time and the labor conditions at our plant, neither of which could be remedied in time to take any substantial effect upon this order. We therefore this morning wired you: 'Labor and material conditions will not permit increasing our award now. Please forward to us plans and samples and arrange war order for transportation of raw material to our factory,' a copy of which we are enclosing you herewith * * *. We are preparing to immediately go to work on this order and to make shipment as we agreed in our proposal."

4. The claimant alleges, under oath, and it is nowhere in the evidence controverted, that a telegram in reply to said letter "was immediately received from Field Medical Supply Depot that we were awarded '2,000 desks, field No. 2, as per specifications attached, to be shipped as follows: 700 on or before Dec. 15th, 1918; balance on or before January 15, 1919.'"

5. No copy of this last-mentioned telegram appears on the files, but Col. Reasoner admits that it was sent, and on November 8 Col. Reasoner wrote claimant that in response to its telegram of November 6 he had directed shipment to claimant of a sample desk No. 2, together with drawings and specifications for same; and, further, that he would at once, upon receiving full information, take up the question of securing a shipping permit or war order for the transportation of the necessary raw material to the factory of claimant.

6. Col. Reasoner himself states in a letter to the Director of Purchase, Medical and Hospital Supplies Division, dated June 11, 1919:

"There could be no possible question but that the award for field desks was given the Morgan Lumber and Mfg. Co. prior to Nov. 11th. On Nov. 5th I wired the Morgan Lumber & Mfg. Co. requesting information as to how many desks they could accept in addition to the 2,000 in bid. Clearly, in this telegram, there is an implication that the bid either has been or is to be awarded them. Their reply on the date of November 6th is to the effect that they could accept no additional ones, but requested that we send plans and samples and arrange war order for transportation of raw material. My reply of November 8th states that I have requested shipment of the sample field desk and also the drawings and specifications for same, and I further informed them that if they would notify me as to location of the lumber and other necessary data, that I would take up the question of securing a shipping permit for them. Clearly, this establishes the fact that an agreement is in existence and that this agreement existed prior to November 8" [1918].

7. The Government caused to be issued a formal contract for 2,000 No. 2 desks, which, however, was not received by the claimant until after the armistice and was never signed.

8. Immediately upon the receipt of the telegram of November 5 the claimant proceeded to prepare for manufacturing said 2,000 desks

and to that end incurred obligations or made expenditures for the filling of the order, which H. E. Shadle, president and general manager of the claimant, shows by affidavits sworn to, respectively, March 27, 1919, and October 16, 1919, were incurred or expended for materials to fill the specific order for these desks implied in the telegram of November 5, and alleges that such obligations and expenditures have been truly set forth in his sworn "Statement relative to unapproved contract FMSD No. 127," which appears on the files in this case, and that said statement covers no prospective profits or charges other than those shown in the statement. There is no evidence before the Board contradicting either of these sworn statements.

9. Lieut. Col. Reasoner, in a letter dated November 20, 1918, notified the claimant that on account of the recent armistice the Government had adopted the policy of calling off all contracts for supplies no longer required; that this would be done through the Department of Purchase, Storage and Traffic; that contracts which had not been started would be canceled, and that raw materials would be diverted when possible to other channels, but if not possible to do this they would be purchased by the Government. As far as appears in the evidence before the Board, no such notice was ever given by the Department of Purchase, Storage and Traffic; but claimant ceased all operations with respect to these 2,000 desks after the receipt of Lieut. Col. Reasoner's letter of November 20, 1918. No hearing was had in this case.

DECISION.

An informal contract exists between the claimant and the United States, within the purview of the act of March 2, 1918, known as the Dent Act, under which the claimant is entitled to be reimbursed by the United States for such obligations or expenditures as were incurred or made by it prior to November 20, 1918, for the purpose of fulfilling said contract for 2,000 desks.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Montgomery concurring.

Case No. 2264.

In re **CLAIM OF NASH MOTORS CO.**

1. **IMPLIED AGREEMENT.**—Where articles are ordered by an authorized representative of the Secretary of War and delivered by a contractor and inspected, passed, and accepted by a Government Inspector at the plant of the contractor, there is an agreement within the purview of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919 for the value of articles delivered to and accepted by the Ordnance Department. Held, claimant is entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919 for \$31.20, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. During the year 1918 the Nash Motors Co., of Kenosha, Wis., was furnishing parts for automobile trucks to the United States Government, and the Government maintained at the plant of claimant an inspector, whose duty it was to inspect and pass all parts ordered by the Government at the factory.

3. By letter of March 12, 1918 signed George D. Wilcox, Major, Ordnance Department, by M. Pulford, First Lieutenant, Ordnance Reserve Corps, claimant company was requested to ship on Government bill of lading one seat cushion and one storage battery to the camp ordnance officer, Camp Doniphan, Okla.

4. On March 21, 1918 the seat cushion and storage battery were duly inspected, passed, and accepted by Michael Lauersen a duly authorized inspector acting under the direction of Lieut. Pulford, and on the same day were shipped on Government bill of lading as requested in Lieut. Pulford's letter of March 12.

DECISION.

1. When the seat cushion and storage battery were inspected, passed, and accepted by the Government Inspector at the plant of the company at Kenosha, Wis., and shipped by claimant company on Government bill of lading as directed, a contract arose between the Government and the claimant within the purview of the act of March 2, 1919, under which the claimant, Nash Motors Co., is entitled to the payment of this claim.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form C to the Claims Board, Ordnance Department, for action in accordance with this decision.

Col. Delafield and Mr. Hamilton concurring.

Case No. 1753.

In re **CLAIM OF BROWN CO.**

1. **UNAMORTIZED FACILITIES.**—Where the claimant, at the request of the Government, agreed to create facilities and the capacity for the production of a certain amount of a certain article daily, and the Government agreed to purchase an undetermined amount of claimant's product at a price which would cover the amortization of claimant's expenditures necessary for creating said additional facilities, and where claimant's production was stopped before claimant had received a sufficient amount to cover said amortization, there resulted an implied contract to pay claimant the difference between the amount expended in developing said capacity and the present value of the facilities so procured, less amount already amortized.
2. **CLAIM AND DECISION.**—This is a Class B claim under the act of March 2, 1919 for \$20,928.28 for unabsorbed amortization on facilities. Held, claimant is entitled to relief.

Mr. Hamilton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a Class B claim under Purchase, Storage and Traffic Division Supply Circular No. 17 for \$20,928.28 damages sustained by reason of an agreement alleged to have been entered into with the Government through Maj. William McPherson, Ordnance Department, United States Army, acting under direction of the Chief of Chemical Warfare Service, for the increase of existing facilities and construction of a new plant for the manufacture of sulphur monochloride.
2. The claimant was engaged in the manufacture of chemicals, including carbon tetrochloride, and was regarded by the department as a possible source of supply of sulphur monochloride.
3. When the need of mustard gas of which sulphur monochloride was an important component was realized, a meeting was called by the Chemical Warfare Service at Baltimore on May 27, 1918 which was attended by several chemical manufacturers from whom the Government expected to procure its requirements of this component. The Government was represented by Maj. Gen. William L. Sibert, Chief

of the Chemical Warfare Service; Col. William H. Walker, commanding officer, Edgewood Arsenal; Lieut. Col. Raymond F. Bacon, Chemical Warfare Service, American Expeditionary Forces; and Maj. William McPherson.

4. The Government's requirements of sulphur monochloride were outlined and the several manufacturers were informed that they would be expected to supply the Government with the needed quantity of sulphur monochloride.

5. On the same day Maj. McPherson instructed the claimant to discontinue the manufacture of carbon tetrochloride for its civilian business and to convert that plant to the manufacture of sulphur monochloride at once. The claimant was also directed to construct the necessary additional facilities to insure a total daily production of 10 tons.

6. Under date of June 3, 1918 Maj. McPherson wrote to the claimant stating a procurement order would be issued for 200 tons of sulphur monochloride in order to cover its early production and that as soon as possible a "long-time" contract would be prepared. Contract No. 1374 for 200 tons was issued in due course and contract No. 4733 was issued on September 9, 1918 for 500 tons.

7. Prior to the Baltimore meeting the Government had procured its sulphur monochloride requirements mainly from one producer whose existing facilities and efficiency enabled it to sell this chemical at $4\frac{1}{2}$ cents per pound. Recognizing the necessity of amortizing increased facilities and the expense incident to starting the production of a new product, the price agreed upon at the meeting to be paid to the new producers was 7 cents per pound. The contracts awarded to the claimant at that figure were intended to cover the amortization of the cost of plant changes and increased facilities.

8. The performance of contract No. 1374 was completed and when contract No. 4733 was suspended, there remained about 250,000 pounds of sulphur monochloride to be delivered. No claim has been made on account of the suspension of contract No. 4733 except in so far as this claim relates thereto.

DECISION.

1. On or about May 27, 1918 claimant agreed to create a capacity for the production of 10 tons of sulphur monochloride daily. The Government agreed to purchase an undetermined amount of this chemical at a price which would cover the amortization of the expenditures necessary for additional facilities. The claimant is entitled to be paid the difference between the amount so expended in developing a capacity for sulphur monochloride and the present value of the facilities so procured, less that portion, if any,

of this difference which has been already paid to claimant in the purchase price paid for the material delivered to the Government.

DISPOSITION.

1. The War Department Board of Contract Adjustment hereby transmits its decision to the Claims Board, Chemical Warfare Service, for recommendation to the Secretary of War of a fair and equitable basis upon which the agreement should be adjusted, paid, and discharged, and for further procedure in the manner provided in subsection C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff.

Col. Delafield and Mr. Montgomery concurring.

Case No. 1743.

In re **CLAIM OF CANTON METAL CEILING CO.**

1. **ALLOWANCE FOR DIES.**—Where for the purpose of interesting manufacturers in the production of steel helmets a duly authorized representative of the Government, at a meeting of manufacturers, including the claimant, states that the Government will make an allowance to such manufacturers as are chosen as contractors, and several manufacturers are so selected, claimant, who is not so selected, but who afterwards at its earnest solicitation obtains an experimental order, in which no mention of such allowance is made, is not entitled to such allowance.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for an allowance of \$2,500. Held, claimant not entitled to recover.

Mr. Harding writing the opinion of the Board.

This is a Class B claim transmitted to us from the Ordnance Claims Board. The case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$2,500, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The board finds the following to be the facts.

1. Early in the year 1917 the Government conceived the idea of having manufactured for it a very large number of steel helmets. It seems that nothing in particular was known in the United States at that time about steel helmets or their manufacture, and after obtaining from the British Ordnance Department certain knowledge as to how to proceed, A. T. Simonds, a Captain in the Ordnance Reserve Corps, United States Army, whose chief was Col. Babbitt, afterwards Gen. Babbitt, was authorized to proceed to make contracts and get production of helmets up to the requirements of the War Department, subject to the contracts being approved and signed by Gen. Babbitt. For the purpose of getting manufacturers interested, Capt. Simonds called two meetings of persons interested in and who were familiar with the operation of pressing metals into automobile bodies, mud guards, rear axles, and similar operations, believing they would have more knowledge than anybody else as to forming metal objects

by pressure, but believing at the same time that the pressing of steel for helmets was so far different from accustomed objects that he would have difficulty in finding adequate facility for pressing the number of helmets required. One of the meetings was held in New York and one of them in Philadelphia, some time in the month of June, 1917. At these meetings a large number of manufacturers of the kind designated were present and Capt. Simonds showed them the material out of which it was desired that the helmets should be pressed, as well as the shape, and told them that a large number of helmets would be needed. He also stated to the assembled manufacturers at one or the other of these meetings, and perhaps at both, that the Government would make an allowance, to such manufacturers as were chosen for contractors, of \$2,500 for the manufacture or installation of dies. Contrary to his expectation of there being few or no manufacturers willing to take upon themselves the pressing of these helmets, he was overburdened immediately with manufacturers of large capacity who were willing and wanted to do this pressing work, and it was at once decided that the Government would not permit any order of less than 100,000 helmets to be given out, and he decided that he would not give contracts to more than eight pressing concerns. This was about the 1st of July, 1917, and this information was transmitted or told to the claimant in this case, according to its own testimony.

2. At one of these meetings, and perhaps at both of them, the claimant was represented by one of its officers and it was very desirous of taking over a Government contract. Before Capt. Simonds selected the eight manufacturers to whom he should give contracts, he visited a large number of the plants of the manufacturers who had applied for contracts or who were desirous of doing the work; and where he could not visit the plants himself he sent his assistant, Lieut. E. D. Perry, to examine the plants as to their facilities, equipment, standing, etc., who should make reports to him on these subjects.

3. After Capt. Simonds had selected the eight concerns to whom the Government would give contracts for the making of the helmets, and to whom he should limit the manufacture, the claimant here was very insistent that it should be allowed an opportunity to manufacture and should be considered the ninth in the list. Before this time claimant had been given a few sheets of metal with which to experiment and had shown that it could in a small way make as good a helmet as any of the manufacturers afterwards chosen to become Government contractors. At claimant's insistence for an opportunity to show what it could do, Capt. Simonds told the claimant to get into communication with Lieut. Perry, who would look over claimant's plant and report to him. Claimant did so, and

Lieut. Perry visited claimant's plant on or about September 5, 1917 and reported to Capt. Simonds that claimant was not equipped for a quantity manufacture of helmets; that it was equipped only with drop presses, which were not best adapted for the pressing of helmets, or the pressing of them in quantities; and therefore Capt. Simonds, having already a sufficient number of contractors to take care of the Government's requirements, reiterated his conclusion not to make the claimant one of the Government contractors.

4. The claimant here bases its claim for \$2,500 for procuring or manufacturing dies on the general statement which Capt. Simonds made to the assembled manufacturers in June, 1917 at Philadelphia and at New York, and on a conversation had with Lieut. Perry at its office at Canton, Ohio, on September 5, 1917, and on a subsequent conversation claimed to have been had with Capt. Simonds after that date but not at a time precisely fixed. Claimant does not assert precisely that Lieut. Perry promised the \$2,500, but the general effect of its testimony seems to be that Lieut. Perry told claimant's officer, Mr. Weirich, that the Government was allowing the \$2,500 for dies to the contractors who had been or would be selected (pp. 18 and 21, Record); and this seems also to be the general effect of the testimony of Lieut. Perry. On September 4, 1917, the day before Lieut. Perry visited the claimant's plant, Capt. Simonds wrote the claimant a letter which claimant received after Lieut. Perry's visit, as follows:

"For your information, the department has adopted manganese steel, and production is just started. Eight pressing concerns have been selected to proceed with dies. No smaller production than 2,000 per day is considered economical, and if all of the eight make their quota, it will be impossible to consider any further bidders."

5. The claimant, however, would not take no for an answer and kept insisting upon getting a contract for some of the helmets, and in a conversation had with Capt. Simonds, Capt. Simonds attempted to discourage any further enterprise on the part of claimant with reference to these helmets, but finally told the claimant, as appears in Capt. Simonds's testimony (p. 52, Record):

"An order for 2,000 experimental helmets was given them at their continuous solicitation, because they were very much interested, and they were distinctly told, as I recall, that they did this at their own risk and liability and in case we could get them steel, which was very difficult to obtain, and that they must assume all experimental costs."

And at page 53, Record:

"We did not think they were fitted, but if they thought they could make 2,000 of these up at their own expense and wanted to do so, we would try to get them 2,000 sheets of steel on which to experiment." (See also p. 75, Record.)

Lieut. Perry testified explicitly that he was not a contracting officer; that he did not say anything to claimant at the only time he ever saw claimant, September 5, 1917, that would induce claimant to go ahead, nor did he say anything to claimant which would lead it to believe that it would be allowed \$2,500, or any other sum, on account of equipment. Claimant, in its petition for relief dated June 28, 1919, states:

"Capt. Simonds did not specifically state that we would or would not be given this die allowance, but we naturally inferred that we would receive the same consideration in this respect as the other manufacturers who were awarded experimental orders for helmets."

6. On September 22, 1917 a purchase order was given to the claimant for 2,000 helmets at the price of 50 cents each, signed by E. B. Babbitt, Colonel, Ordnance Department, United States Army, which was received by the claimant September 27, 1917, accepted by it, blue-print specifications with reference thereto having been before sent to claimant, and subsequently to the purchase order the Government furnished to the claimant 2,000 plates of steel out of which to press helmets in question, and the plates were subsequently pressed and paid for. The pressing resulted in 1,565 helmets and 435 spoiled plates. A subsequent allowance of 20 cents per helmet was made and paid to the claimant for finishing them up.

Claimant testified that the \$2,500 claimed in this case for the manufacture of the dies was expended after receiving the purchase order. No further contract was given to the claimant.

DECISION.

1. The above facts bring us irresistibly to the conclusion that there was no contract between the claimant and the Government by which the Government agreed to pay the claimant the \$2,500 in question.

We might well rest the case on the well-known legal principle that all talks, negotiations, propositions, and side remarks of the parties had or made before the purchase order were merged in the purchase order, which by its acceptance and performance became a written contract; but it seems proper also to remark that the dealings of Capt. Simonds and Lieut. Perry with the claimant were perfectly straightforward and open and that any expenditure made by the claimant relying thereon was to be and was at its own risk. The desire of the claimant to become a Government contractor was a laudable ambition, even after it was advised that the Government's quota of desired manufacturers was full; but the evidence is very clear that claimant's desire to get contracts and to become the ninth on the list, as expressed by its witness on the hearing, was so great that it was willing to and did take the business risk of making the expenditures

for which it is now making claim. The claimant was at no time bound to do so by any contract. The mere courtesy shown it by the Government officers can not be construed into a contract, nor can a contract be inferred from the facts. The claimant did not become a Government contractor in the sense in which the words were used and in which they should have been understood.

The claim should be disallowed.

DISPOSITION.

The claim is disallowed.

Col. Delafield and Mr. McCandless concurring.

Case No. 247.

In re CLAIM OF THE LAWSON AIRCRAFT CORPORATION.

1. **EXPENSES IN ANTICIPATION OF CONTRACT.**—Where a Government agent told an aeroplane manufacturer that if it would demonstrate its ability to produce satisfactory aeroplanes in production quantities, and satisfy the Procurement Division that its company was financially able to go through with the contract, he would recommend it for an award, and that an officer of the Procurement Division told claimant company it would have to show a deposit of \$60,000 before they would give it a contract, and claimant company did so qualify in November, but the contract was not placed by reason of the armistice, there is no agreement, express or implied, whereby the Government is obligated to reimburse claimant for the amount expended in preparation.
2. **CLAIM AND DECISION.**—Claim is made under the act of March 2, 1919, for \$84,631.49, alleged expenses in preparing to make aeroplanes. Held, claimant is not entitled to recover.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$84,631.49, by reason of an agreement entered into between the claimant and the United States on or about April 20, 1917, and thereafter.
2. Claimant's counsel stated that the claim should be divided into three periods: First, in April, 1917 (p. 7), the claimant was told by Col. V. E. Clark to go ahead and demonstrate its ability to build an aeroplane in accordance with specifications furnished, and that the claimant did so and expected to obtain a contract thereafter; second, that about February 20, 1918, Howard Coffin, chairman of the Aircraft Board, informed Mr. Lawson that it was the policy of the Government not to award contracts to small concerns, and that if the claimant could prepare itself to finance and manufacture a large number of aeroplanes (p. 5) he would be glad to recommend the claimant for such a contract; that the claimant thereupon secured an option on a large plant and arranged to finance a large production;

and, third, that on or about September 9, 1917, C. W. Nash, assistant manager of Aircraft Production, made statements from which the claimant understood that the Government would award claimant a contract for the manufacture of 100 JN-4D training planes, and thereafter the Procurement Division advised the purchase of said planes from the said claimant, but the contract recommended by the Procurement Division was never executed.

3. The first period: Mr. Lawson testified (pp. 125 and 126) that in April, 1917, he called on Col. V. E. Clark and spoke to him about building a scout machine which Col. Clark said the Government did not need; that Col. Clark then gave him specifications No. 1001 and said, in substance:

“That is the type of machine we need now. I would advise you to build some of those machines * * * you will have to demonstrate your ability, of course, to build these ships according to specifications.”

Mr. Lawson testified (p. 127):

“I acted under the advice of Col. Clark in building a primary type aeroplane with the understanding that we would get a contract later on, although Col. Clark never stated outright to me that we would get one.”

Lieut. Col. Clark testified (p. 138) that in April, 1917, he was a captain in the Aviation Section of the Signal Corps; that he does not remember the said conversation; (p. 141) at that time the practice was in his department to tell designers who submitted designs to the Government that if they could afford to do so, without the Government taking any responsibility, to go home and build aeroplanes to a certain design; and that he sometimes issued sets of specifications; (p. 144) that his duty was entirely advisory, and that he passed on designs and made recommendations.

4. The second period relating to claimant's dealings with Howard E. Coffin.

Alfred E. Lawson testified that about February 20, 1918, he talked with Howard E. Coffin, who said (p. 65):

“He preferred to give me a large order or none at all * * * he did not think it good policy to give out small orders * * * that if I could get some financial men up in Wisconsin to sort of back up our company where it would appear we could build a large number of machines * * * that he would be glad to see that we got an order (p. 66). Mr. Coffin stated specifically that we would have to be able to build about 500 machines to take an order for anywhere from 500 to 2,000 (p. 69). He told me I would have to be backed up by responsible financial men who would agree to see this thing through if they should give me an order.”

On March 9, 1918, Mr. Lawson telegraphed and on March 11, 1918, wrote Mr. Coffin that the claimant had followed the instructions and

was ready to sign a contract, and on March 11, 1918, Mr. Coffin telegraphed him as follows:

"I am bringing matter of your wire March 9, to attention of Aircraft Board and also to both War and Navy Departments."

Howard E. Coffin testified (p. 82) that at the time of his conversation with Mr. Lawson on February 20, 1918, he was chairman of the Aircraft Board; that his duties were advisory; that in his conversation with Mr. Lawson he said:

Page 84:

"I have not any doubt that I stated to him that if he desired to obtain the favorable consideration of the departments that he ought to place himself in a position to build not less than 500 planes, and I obviously could not and certainly would not make him a definite promise of orders."

Page 85:

"Of course, I do not recall our whole lunch-table conversation with accuracy, but am sure that my talk to him was in the nature of advice as to what I felt he should do in order to interest the departments in his manufacturing institution."

Shortly thereafter Mr. Coffin resigned from the Aircraft Board and Mr. H. B. Thayer took his place as chairman. Mr. Thayer testified (p. 58) that Mr. Bloodgood, of Milwaukee, called and stated the Lawson Aircraft Co. was anxious to get aircraft business; that he did not remember the details of the conversation (p. 60); that at the time he was appointed the Aircraft Board had no authority to purchase; its duties were advisory.

5. The third period relates to the alleged order for 100 JN-4D training planes.

C. W. Nash states in his affidavit of July 10, 1919, that in August, 1918, he was assistant to John D. Ryan, in charge of production engineering; that A. W. Lawson called on him at Dayton, Ohio, and he remembers telling Mr. Lawson he was doubtful of Mr. Lawson's ability to manufacture airplanes on a production basis, due to his lack of finance and manufacturing facilities; and he stated to Mr. Lawson:

"That if he could satisfy the Purchasing Department of the Aircraft of his ability to properly finance and produce the planes that I would instruct the Purchasing Department to place an order with him for 100 planes at the same price that the Government was then paying the Curtiss Co. for the same type of machines."

Mr. Alfred W. Lawson testified (p. 128) that on September 9, 1918, a conference was held at Dayton, Ohio, at which Mr. C. W. Nash, A. A. Landon, and Col. Mixter were present; that he was asked by Mr. Nash at said meeting if he would take an order for 100 JN-4D machines; that Mr. Nash then asked him if he would

write a letter to that effect, and he thereupon wrote a letter directed to C. W. Nash, Assistant Director of Aircraft Production, dated Dayton, Ohio, September 9, 1918, which reads as follows:

"Subject: 100 JN-4 training planes.

"1. The Lawson Aircraft Corporation is willing to accept an order from the United States Government for 100 JN-4 training planes at the prevailing price as given other concerns for the manufacture of this type of machine.

"2. The Lawson Aircraft Corporation agrees to begin delivery on some of these machines within four (4) months from the date that the order is received and to average more than one (1) machine a day delivered thereafter until the full 100 machines have been delivered.

"3. The Lawson Aircraft Corporation will finance the building of these 100 planes and will not expect the Government to do any of the financing of it.

"4. The Lawson Aircraft Corporation will expect that the Government will cooperate with it and render whatever assistance that it renders other concerns in overcoming delays in materials that are needed for this work.

"5. This letter shall be considered as a basis and not a part of the contract as finally written."

Mr. Lawson states (p. 131) that Mr. Landon told him the above letter was an agreement and that he thought it was an agreement.

A. A. Landon testified (p. 89) that after May 10, 1918, he was Chief of the Aircraft Production. It was Mr. Landon's duty to recommend facilities to the Procurement Division. His duties were advisory. He testified:

Page 91:

"We agreed to give Mr. Lawson an order for 100 JN-4D planes * * * *in Dayton between Mr. Nash, Mr. Lawson, and myself*, if my recollection is correct. It was afterwards confirmed. We agreed that he was to get an order for 100 planes."

Page 95:

"He was to satisfy the Purchasing Department as to their usual requirements, which were as to his financial ability to go through with the order and all that."

Page 98:

"Question. Did you say they would get orders or be given consideration?"

"Answer. I may have said it either way. The fact of the matter is, we were in a position when we had no orders to place for training planes. We had training planes in storage and when the orders did come along Mr. Lawson was in consideration for an order for training planes.

"Question. Each time you mentioned giving orders to the claimant. Then you qualified that further.

"Answer. I do not remember definitely ever promising anybody a definite order. It would not be good business to do it."

Page 100:

"We did narrow down to telling Mr. Lawson along about September that if he would take a fixed-price contract at the same price that the other manufacturers were receiving we would give him an order for 100 planes. Now, the execution of that order and his satisfying the contracting officers and the procurement officers as to his responsibility and all of that was in process, I take it, when the armistice was signed, because the thing never came back to me from that time on."

Page 102:

"What really happened in the thing was that when the Military Aeronautics made their requisitions, then we made recommendations as to facilities to Potter and Ryan and through Downing and his organization back to Potter for signatures.

"Question. When you had the conversation, then, with Mr. Lawson, did you state, in effect, that you would send a requisition to the Purchasing Department recommending the purchase of 100 JN-4D planes?

"Answer. For 100 JN-4D's; yes. It was a final order, so far as we were concerned, if he met the necessary conditions of the contract. It would not be a final order until it was signed."

Page 103:

"Did you in your conversation say anything which would lead him to the conclusion that he had an absolute contract or the essentials of a contract with the Government?

"Answer. Certainly not. It would not be in our power to make such a statement."

On September 19, 1918, Mr. Lawson telegraphed C. W. Nash:

"Have not heard anything further regarding our conference at Dayton. Can we expect something definite this week?"

and received the following day a telegram from Mr. Nash as follows:

"Production Division, Washington: Advise purchase requisition placed with Procurements Division. Suggest you communicate Mr. Fletcher, chief of that division."

Mr. Lawson then telegraphed Mr. Fletcher on September 20, 1918, as follows:

"C. W. Nash suggests our communicating with you relative to 100 JN-4 training planes."

Mr. Fletcher replied on September 30, 1918:

"I will be in Dayton Wednesday and Thursday, at which time I shall take up your telegram with Mr. Nash and communicate with you."

Mr. Lawson met Mr. Fletcher in Dayton and was introduced to Col. H. S. Brown, Chief of the Finance Division, who told Mr. Law-

son he must furnish letters showing that the claimant was a responsible concern. On October 3, 1918, Mr. Lawson met Col. Brown in Washington, and delivered to him letters from responsible parties in Wisconsin. On October 14, 1918, Mr. Lawson was informed by Col. Downing that it would be necessary for the claimant to have \$60,000 on deposit before the Government would sign a contract for the construction of 100 JN-4 training planes. On November 1, 1918 he (Mr. Lawson) telegraphed J. G. Fletcher, Chief of Aircraft Procurement, that the claimant had deposited the \$60,000 in the bank. On November 4, 1918, Mr. Lawson met Mr. Fletcher in Washington and was told that it was necessary to wait another week or 10 days before anything could be done. On November 4, 1918, Mr. Fletcher wrote the claimant as follows:

"You will, I realize, be disappointed that Mr. Alfred W. Lawson, your vice president and general manager, has not succeeded in securing from this division of the United States Government an order for 100 JN-4D training planes. You had, through Mr. Lawson, every reason to feel that when your financial position was squared with our views of the matter, a formal order for the planes in question would be forthcoming from me. However, since the date of my request that the Lawson Aircraft Corporation should place in bank additional working capital, so that the total would show \$60,000.00 in bank, and to-day there has been a decided change in the training program, which leaves me without a purchase requisition upon which to base an order. It may be that, within a few weeks, we shall be in a position to place other orders for JN-4D planes, in which event the Lawson Aircraft Corporation will stand before us as a preferred source of supply and will, without doubt, be used. Should there be a happy termination of the war quickly, which the newspapers rather indicate this morning, I am inclined to the belief that the United States Government will not need any more primary training machines than they already have under order.

"Mr. Lawson has kept your case constantly before this division, and we regret that we can not reward his courteous and untiring efforts at this time with anything more than this communication."

Mr. Fletcher testified (p. 35) at the time he met Mr. Lawson in Dayton the question was being discussed as to whether the JN-4D training planes should be changed to another type of plane, and that he was not ready to place an order because the Production Division did not know exactly what they wanted. Mr. Fletcher testified (p. 28) he told Mr. Lawson that after he had shown his financial responsibility he would be ready to negotiate with Mr. Lawson (p. 29):

"Mr. Lawson never had any definite promise from me that if any conditions precedent were met he would be given an order."

William C. Potter testified (p. 44) he was Assistant Director of Aircraft Production and both Production and Procurement Divisions

worked under his supervision. Mr. Potter testified that the claimant was not given a contract, and (p. 51)—

“The reason that Mr. Lawson was not given a contract was due to the fact that at the time he had assured the Procurement Division of his financial responsibility, it was very apparent that the war was coming to an end, and it was not desired at that time with our eyes wide open to place contracts which would be of no service to the Government.”

DECISION.

1. We find no agreement was made between the claimant and Capt. V. E. Clark. The claimant obtained specifications from Capt. Clark of the type of aeroplane needed, with the apparent intention of demonstrating its ability to manufacture such machines.

2. We find no agreement was made between the claimant and Howard E. Coffin, although Mr. Lawson testified that Mr. Coffin stated that if the claimant could get financial backing and could demonstrate its ability to build a large number of machines he and Mr. Coffin would see that the claimant received an order (p. 66). Mr. Coffin testified (p. 84) his duties were merely advisory, that he could not make Mr. Lawson a definite promise of an order, and he advised Mr. Lawson if the claimant desired to obtain favorable consideration it should place itself in a position to build not less than 500 planes.

3. Mr. Nash states that at the meeting in Dayton, Ohio, on or about September 9, 1918, he told Mr. Lawson he (Mr. Nash) would instruct the Purchasing Department to give claimant an order for 100 planes if Mr. Lawson could satisfy said department that he could produce and finance the planes. A. A. Landon states that at the said meeting they agreed Mr. Lawson was to get an order, but later qualifies his statement by saying that Mr. Lawson was to satisfy the Purchasing Department as to his financial ability. The letter of September 9, 1918, summarizes the conclusion of the parties by setting forth claimant's offer that it would accept an order for 100 JN-4 training planes at the prevailing price and finance the building of the said planes, and that the letter should be considered as a basis and not a part of the contract as finally written.

4. On September 20, 1918, Mr. Nash advised Mr. Lawson that a requisition recommending an order had been placed with Procurement Division and suggested that Mr. Lawson communicate with Mr. Fletcher, Chief of the Procurement Division. Mr. Lawson then commenced negotiations with Mr. Fletcher and Col. H. S. Brown, Chief of the Finance Division, and finally, about November 1, 1918, was able to meet the financial requirements. On November 4, 1918, Mr.

Fletcher wrote the claimant that since his request that the claimant show it had \$60,000 to its credit there had been a change in the training program, so that no orders could be placed at that time, and that should the war terminate quickly the Government would not need further machines.

5. It is to be regretted that the claimant, after experimenting and equipping itself, and after obtaining necessary capital, was too late to obtain an order for planes. After a careful examination of the evidence, the correspondence, and the claimant's briefs we find that no agreement was made with the claimant for the purchase of planes by the United States.

Col. Delafield, Mr. Hunt, and Mr. Shirk concurring.

Case No. 2009.

In re **CLAIM OF THE CINCINNATI ENQUIRER.**

- 1. ADVERTISING—SECTION 3828, REVISED STATUTES.**—The act of March 2, 1919, provides relief only in cases where the statutory requirements in connection with the execution of contracts were not met; it does not authorize adjustment of an agreement entered into in direct contravention of a statute. This Board, therefore, can not recommend the payment of a bill for advertising contracted in violation of section 3828, Revised Statutes, which provides that no advertisement shall be published except in pursuance of written authority from the head of an executive department.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for the cost of an advertisement. Held, claimant is not entitled to relief.

Mr. Patterson writing the opinion of the Board.

This claim arises under the act of March 2, 1919. The Government attorney's report states that it is a Class B claim, appeal on Class A, but no copy of the statement of claim is found in the file. The claim appears to have been presented to the Air Service Claims Board, by which it was disallowed and an appeal from such disallowance taken by claimant to this Board.

A letter was written to claimant on January 28, 1920, after previous correspondence, asking if it desired a further hearing or whether it would submit its claims upon the papers already filed with the Board. No response to this letter has been received.

FINDINGS OF FACT AND DECISION.

The Board finds the following to be the facts:

I.

On or about March 21, 1918, one Maj. B. D. Gray, Signal Corps, United States Army, was in charge of the Production Engineering Department, Lindsey Building, Dayton, Ohio. F. R. Bunnell was office manager.

II.

On March 21, 1918, said F. R. Bunnell wrote the following letter to claimant:

WAR DEPARTMENT,
PRODUCTION ENGINEERING DEPARTMENT,
SIGNAL CORPS, U. S. ARMY,
Lindsey Building, Dayton, Ohio, March 21, 1918.

From: Production Engineering Dept.
To: Cincinnati Enquirer, Cincinnati, Ohio.
Subject: Advertisement for help.

1. Please insert the following ad in your issues of Saturday and Sunday, March 24 and 25, under Classification "Female Help Wanted":

"Wanted: First-class, experienced file clerk for Government work. We are desirous of obtaining services of one who has had considerable experience in filing; a girl possessed of good personality, common sense and good judgment, capable of assuming responsibility. Good salary paid. Write or call Production Engineering Department, Lindsey Building, Dayton, Ohio."

By direction of Major B. D. Gray:

(Signed) F. R. BUNNELL, *Office Manager.*

III.

The advertisement set forth in the preceding finding was published by claimant in its newspaper, and a bill of \$2.34 rendered for such publication.

IV.

Section 3828 of the United States Revised Statutes, in force at the time of the letter and publication set forth in Findings II and III above, is as follows:

"No advertisement, notice, or proposal for any Executive Department of the Government, or for any Bureau thereof, or for any office therewith connected, shall be published in any newspaper whatever, except in pursuance of a written authority for such publication from the head of such Department; and no bill for any advertising, or publication, shall be paid, unless there be presented, with such bill, a copy of such written authority."

V.

The Comptroller of the Treasury, in a decision rendered ——— 17, 1918, Appeal No. 30497, in the case of a claim of the Dallas Morning News for an advertisement inserted for machinery and supplies for a bureau of the Department of Agriculture. held. citing

a previous decision by his office dated October 15, 1898, published in 5 Compt. Dec., 166, 168, as follows:

"The written authority for the publication of advertisements, etc., under section 3828, Revised Statutes, *must precede such publication*. No subsequent approval or authorization can legalize advertising done without such written authority, so as to warrant payment for the same."

VI.

While the act of March 2, 1919, does not apply to the Department of Agriculture, it is not thought that its provisions can be invoked in claimant's behalf in this case. The act of March 2, 1919, relieves persons dealing with the Government during the emergency from the effect of failure to comply with statutory requirements in connection with the *execution* of contracts which would have been lawful if properly executed; it does not authorize the Secretary of War to adjust an agreement entered into in direct contravention of a statute such as that quoted in the preceding finding.

VII.

This Board is therefore without power to recommend the payment of this claim, notwithstanding that the position which it is compelled to take necessarily involves the proposition that an officer, charged with most important duties in a period of great stress, who apparently has authority to employ such a clerk as the one described in the advertisement quoted above, can not avail himself of the obvious method of advertising for one without the delay required to write to Washington for specific authority, but must either go out and look for one himself or detach some one for the purpose whose time might be presumably employed to greater advantage in his regular duties. Congress having seen fit to enact this statute and allow it to remain unmodified, respect must be paid to its provisions.

DISPOSITION.

This Board will enter the usual final order, denying relief.
Col. Delafield and Lieut. Col. McKeeby concurring.

Cases Nos. 2182 and 2159.

In re CLAIM OF COHEN-GOLDMAN & CO.

1. **CONSTRUCTION OF LABOR-DISPUTE CLAUSE.**—Where a labor-dispute clause in a contract provided that the Secretary of War might, in his discretion, direct that fair and just compensation be made in case the contractor is required by the settlement made by the Secretary of War to pay labor costs higher than those prevailing prior to such settlement, but that no claim for additional compensation should be made unless the same was ordered in writing by the Secretary of War, the ordering of an addition to the contract price is a matter of discretion.
2. **SAME.**—This clause means that the Secretary of War at the time of his settlement of a labor dispute may, at his discretion, direct such addition to the contract price, and since the Secretary of War did not at that time exercise his discretion it must be inferred that in his judgment the facts justified no addition to the contract price.
3. **SAME—WAGES BELOW STANDARD.**—If it is suggested that it be recommended that the discretion of the Secretary of War should now be exercised it must be held that claimant is not entitled to this additional compensation because the wages paid its employees were below the standard rates for similar work in the vicinity of claimant's plant and no facts have been submitted to warrant the additional compensation.
4. **CLAIM AND DECISION.**—Claims under the act of March 2, 1919, and also under General Order 103 for additional compensation under labor-dispute clauses of clothing contracts, some of which were formally and some informally executed. Held, claimant is not entitled to relief.

Mr. Hunt writing the opinion of the Board.

FINDINGS OF FACT.

This is an appeal from the decision of the Claims Board, Director of Purchase, denying claimant's claim.

The claim is for additional compensation alleged to be due the contractor under clause 11 (the labor-dispute clause) by reason of an award alleged to have been made to the contractor by the Secretary of War.

During July and August, 1918 the claimant entered into contracts with the United States Nos. 4271-N, 4519-N, 4616-N, 4899-N, and 5552-N for the delivery of uniform clothing to the Army. All these contracts contained the labor-dispute clause set forth in Q. M. C. Form 108-B. During the month of August and during the perform-

ance of these contracts, a strike occurred at one of the claimant's plants in the city of New York.

On or about April 13, 1918, Prof. W. Z. Ripley was appointed Administrator of Labor Standards by the Secretary of War. His duty, among other things, was to hear and determine for the Secretary of War labor disputes arising under the said clause 11. This clause empowered the Secretary of War to settle such disputes and obligated the contractor to accede to and comply with all the terms of such settlement. The clause also provided that if the contractor was required by the Secretary of War's settlement of such disputes to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War might in his discretion direct that a fair and just addition to the contract price be made on account thereof. The said clause further provided that no claim for addition or deduction should be made unless the same had been ordered in writing by the Secretary of War.

The strike of the claimant's employees having come to the knowledge of the Administrator of Labor Standards, the parties to the controversy were requested to and did come before him, and a hearing was had at which the matters in dispute were discussed. It was determined at said hearing to refer such matters to Dr. N. I. Stone, who was at the time Chief of the Cost Studies Section in the Quartermaster General's Office, Clothing and Equipage Division, whose duty it was to investigate the cost of production of the various articles coming under the Clothing and Equipage Division for which Government contracts had been awarded. These studies were used as a basis for adjusting wages whenever wage disputes on Government contracts arose.

On September 30, 1918, Dr. Stone made a report to Prof. Ripley. The first paragraph of this report recites that Dr. Stone had worked out a complete scale of piece rates for woolen service coats and for overcoats and trousers. The report recites that the claimant had agreed to put into effect piece rates subject to the reservation that in case modification of some of the rates was required because of differences in methods of doing the work in claimant's plants, that the claimant was free to make such modification by agreement with its employees.

With regard to cutters, which term includes markers, machine cutters, head trimmers, lining cutters, fitters, and spreaders, who were paid by the week and not by the piece, Dr. Stone failed to bring the parties to an agreement. (Memo. dated Sept. 30, 1918.)

On October 19, 1918, the Administrator of Labor Disputes rendered his decision, which determined the rates for cutters at certain amounts per week.

A hearing was afforded by this Board to the claimant, at which hearing the claimant insisted that the entire controversy, including the wages to be paid pieceworkers as well as week workers, was submitted to the Administrator of Labor Standards, and that the administrator rendered his decision requiring the claimant to pay labor costs higher than those prevailing in the claimant's contract immediately prior to said decision. The claimant alleges that the said decision as to pieceworkers was expressed by Prof. Ripley orally and the decision as to cutters, who were paid by the week, was expressed in writing. As appears by the decision of October 19, 1918, Prof. Ripley and Dr. Stone testified at the hearing that the rates paid to cutters and to pieceworkers were lower than the standard rate of wages prevailing for similar work in the New York district. It was further testified to by Prof. Ripley that in no case did he render an oral decision on controversies submitted to him.

DECISION.

The labor-dispute clause provides that the Secretary of War may, in his discretion, direct that fair and just compensation be made in case the contractor is required by the settlements made by the Secretary of War on labor disputes to pay labor costs higher than those prevailing in the contract immediately prior to such settlement. The clause further provides that no claim for addition shall be made unless the same has been ordered in writing by the Secretary of War. This ordering of additions to the contract price is clearly within the discretion of the Secretary of War. It does not appear that the Secretary of War has ordered any addition in writing or otherwise. The decision of Prof. Ripley does not contain any finding on behalf of the Secretary of War that any addition should be made.

It appeared at the hearing, from the testimony of Dr. Stone, that the wages paid by this claimant were below the standard rates or wages paid by similar contractors for the same class of work in the New York district.

It would appear clear from an examination of clause 11 that it was the intention of the parties that the Secretary of War should, at the time of the settlement by the Secretary of War of the dispute submitted in his discretion direct at that time such addition to the contract as he might determine to be fair and just. The Secretary of War, then, not having exercised his discretion, it must be inferred that in his judgment the facts and circumstances justified no addition to the contract price. It would appear that this omission to award additional compensation was for the reason that the contractor's rate of wages was below the standard rate as above stated.

The discretion of the Secretary of War not having been exercised, it follows that the claimant's claim must be denied. If it should be argued that the discretion of the Secretary of War may now be exercised by this Board or that a recommendation should be made by this Board that the Secretary of War now exercise his discretion, it must be determined that the facts submitted do not warrant a recommendation for the payment to the claimant of additional compensation, for the reason that the wages paid its employees are shown to have been below the standard rates prevailing in the New York district for similar work to the extent of the increases recommended by Dr. Stone.

DISPOSITION.

A final order will be entered denying the claim. The Claims Board, Office of the Director of Purchase, will be informed of this decision.

Col. Delafield and Mr. Smith concurring.

Case No. 2157.

In re CLAIM OF SCHOFIELD-MASON & CO.

1. **FACILITIES—ALTERATION OF LOOMS.**—Where claimant, a carpet manufacturer, altered its carpet looms in order to weave duck under Government contracts, no agreement on the part of the Government can be implied from the mere fact of alteration such as will entitle claimant to reimbursement of expense of alteration.
2. **RECOMMENDATION BY COUNCIL OF NATIONAL DEFENSE.**—A letter from the chairman of the committee on supplies, Council of National Defense, recommending a certain agreement between claimant and a depot quartermaster, can not be considered as an agreement when on its face it is a mere recommendation.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, originally based upon a proxy-signed contract for the manufacture of duck but transmitted to this Board because the claim rests upon an alleged agreement with the Council of National Defense. Held, claimant is not entitled to relief.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This is a statement of claim, Form A, filed originally with the Claims Board, Office of the Director of Purchase, and by that board transmitted here for the reason that the claim rests upon the alleged agreement with Mr. Albert L. Scott, chairman of the committee on supplies, Council of National Defense.

The claimant seeks to recover the sum of \$50,255.84, which is alleged to be the expense of altering 80 carpet looms for weaving duck and the expense of realtering the said looms in such manner as to enable the claimant to weave carpet.

FINDING OF FACTS.

A hearing was afforded claimant on December 20, 1919. It appears that the claimant is a manufacturer of Wilton and other carpets, and was thus in possession of looms capable of being utilized for the weaving of duck for the use of the Army. The statement of claim

sets out as evidence of its agreement with Mr. Scott a letter dated August 9, 1917, of which a copy follows:

"Confirming our understanding to-day, we will recommend to the depot quartermaster at Phila. that you undertake to furnish #6 duck to the Government on the following basis:

"You will start in at once to manufacture #6 duck in 30" and 42" widths after your sample has been approved by the depot quartermaster at Phila. You will start 10 looms on 30" and 6 looms on 42", and these goods will be billed to the Government at a price of 64¢ per yd. on the 30" and 90¢ on the 42". After eight or ten weeks' run, when you are able to get up your accurate costs, you are to come to the committee on supplies with these costs, and if the price mentioned above does not show your costs plus 10% profit the price will be adjusted according. In the event that your price is too high and the Govt. does not continue this contract, they will reimburse you for any expense you may have been put to beyond what you have already been paid, so that you will get out of the entire transaction without any loss.

"It is expected that if these goods are satisfactory to the depot quartermaster and can be produced at a reasonable price, taking the extra costs at this mill into consideration, you will offer to the Govt. 1,400,000 yds. to be delivered from October to June 30, 1918, and this letter is written in the hope that such a contract may be entered into.

"Yours, truly,

"COMMITTEE ON SUPPLIES.

"(Sd.) ALBERT L. SCOTT."

It also appears that on or about August 9, 1917, the United States was in great need of duck for Army purposes and that the ordinary sources of supply of this article were insufficient to meet the need. Accordingly, the committee on supplies of the Council of National Defense and officers of the Quartermaster Corps endeavored to persuade carpet manufacturers to undertake contracts for the manufacture of duck. The claimant alleges that it endeavored to secure contracts on a cost-plus basis, but the officers of the Quartermaster Corps insisted that the contracts be made on a fixed-price basis. Accordingly, contracts were entered into as follows:

E-472—Purchase Ord. No. ET-128—dated October 29, 1917, for the delivery of 90,000 yards of duck for the sum of \$79,200, or 88 cents per yard. This contract was fully performed and contractor has been paid the agreed price by the United States.

Contract E-861—Purchase Ord. No. ET-239—dated December 28, 1917, for the delivery of 150,000 yards of olive drab duck at 91 cents per yard, amounting to \$136,500. This contract was fully executed and the purchase price paid by the United States.

Contract No. 1019—Purchase Ord. No. ET-338—dated December 28, 1917, provides for the delivery of 112,000 yards of duck at 97 cents

per yard, or the sum of \$101,920. This contract was also duly performed and the contractor paid the price in full.

On April 5, 1918, the claimant entered into a contract numbered "War Ord.—P.—5400-3863 Eq.," which contract was proxy signed, dated April 5, 1918, for the delivery of 260,000 yards of duck at 89 cents per yard net. (This contract was supplemented later in a manner not necessary to discuss for the purposes of this decision.)

On November 21, 1917, the claimant executed contract No. 163-P, proxy signed by Maj. Fred A. Ellison on behalf of Col. H. F. Hirsch, Quartermaster Corps, for the delivery of 600,000 yards of duck, of which 408,000 was to be delivered at \$0.755 per yard, 96,000 at \$0.999 per yard, and 96,000 at \$1.053 per yard. This is the only contract of this claimant not fully performed.

On November 21, 1918, the claimant was requested by the United States to suspend warping under this last-named contract. Proceedings to accomplish a settlement took place under the direction of the Claims Board, Office of the Director of Purchase, and a recommendation made by the appropriate officer of the Pennsylvania depot, as appears by brief of settlement, claim No. PC-3059, which recommendation provided that 45,951½ yards of the said duck were to be cancelled and the contractor paid \$2,043.01 in full settlement of all claims under the said contract. The contractor declined to accept the said amount and demanded reimbursement of the cost of alteration of his carpet-weaving looms to duck-weaving looms and back again in the sum of \$50,255.84. It also appears from the papers herein that the said amount of \$2,043.01 was an error. The true amount intended to be paid the contractor is \$1,950.55.

DECISION.

There is no evidence before this Board tending to show that the United States ever agreed to compensate contractor for his expense in loom alteration, nor is there any evidence whereby any such agreement can be raised by implication of law or of fact.

The letter of August 9, 1917, signed Albert L. Scott, on which the claimant relies, is on its face nothing more than a recommendation.

It appears, furthermore, that the contracts which were afterwards entered into with the claimant by the Government were at prices in excess of the prices recommended in this letter. All contracts entered into with the United States has been fully performed, with the exception of contract No. 163-P, under which only 45,951½ yards were cancelled out of the total to be delivered of approximately 600,000 yards.

The evidence shows that the claimant had a number of opportunities to make such agreements as to price as would recoup it for its expense in loom alteration. If it failed to do so, such failure was due to its own voluntary action. The claimant now asks the United States to repair its omission in this respect.

DISPOSITION.

A final order will be entered denying claimant relief. The Claims Board, Office of the Director of Purchase, will be so informed.

Col. Delafield, Mr. McCandless, and Mr. Shirk concurring.

Case No. 1479.

In re **CLAIM OF FULLER CANNERIES CO.**

1. **INTEREST—BULLETINS OF FOOD ADMINISTRATION.**—Where by action of the Food Administration, ratified and adopted by the Secretary of War, 15 per cent of claimant's 1918 pack of canned goods was taken for the use of the Army and it was provided that from a fixed date interest at 6 per cent should be allowed, claimant is entitled to such interest.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for interest based upon a purchase order for canned peas and certain bulletins of the Food Administration. Held, claimant is entitled to interest.

Mr. Harding writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$119.29, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On June 12, 1918, an allotment was made to the claimant by the Food Administration for 3,000 cases, more or less, of canned peas, 1918 pack, and to be 15 per cent of the entire pack of the claimant, such allotment to be made to the Navy. On July 31, 1918, this allotment was changed to the Army and a purchase order issued therefor, shipment not to be made until Government bills of lading were furnished. It was subsequently ascertained that 15 per cent of the claimant's entire pack would amount to 5,000 cases, and the Government gave direction that such 5,000 cases should be shipped, and on September 10, 1918, the depot quartermaster notified the claimant that when the goods were ready to be shipped proper bills of lading would be forwarded and the required number of cars furnished. The goods were shipped on September 30, 1918, October 1, 1918, and October 4, 1918, in accordance with Government instructions. Tentative payments were made; \$9,315 on November 1, 1918, and \$4,185 on November 8, 1918.

2. Under bulletins issued by the Food Administration, which were ratified and adopted by the Secretary of War, the Director of

Purchase of the Subsistence Division issued to all zone supply offices letters dated March 21, 1919, March 22, 1919, and May 16, 1919, fixing the date of October 1, 1918, as a date from which interest should be computed at 6 per cent to the date of tentative payments. The zone supply officer under date of April 28, 1919, denied the right to claimant to interest.

This claim is considered and decided in connection with claim 150-C-1200 by the same claimant.

DECISION.

1. The bulletins of the Food Administration adopted by the War Department, and the instructions issued thereunder evidently entered into the formation of the contract set out in the findings of fact, and should be taken into account in the construction of it. The claimant should be allowed interest at 6 per cent per annum on his tentative payments in accordance with the bulletins of the Food Administration and of the instructions issued thereunder, to be computed in accordance with the terms thereof.

DISPOSITION.

1. This Board will cause the amount due to the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage, and Traffic Division, and will make the statutory award and cause the same to be executed in behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Hamilton concurring.

Case No. 2265.

In re **CLAIM OF NASH MOTORS CO.**

1. **IMPLIED AGREEMENT.**—Where an article is ordered by an officer having authority and delivered by a contractor and inspected, passed, and accepted by a Government inspector at the plant of the contractor, there is an agreement within the purview of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for the value of one muffler delivered to and accepted by the Ordnance Department. Held, claimant is entitled to relief.

Lieut. Col. McKeeby writing the question of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$9.75, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. During the year 1918 the Nash Motors Co., of Kenosha, Wis., was furnishing automobile chassis for trucks and parts for automobile trucks to the United States Government.

3. The United States Government maintained an inspector at the plant of claimant whose duty it was to inspect and pass all chassis and parts ordered by the Government at the factory.

4. During the early part of 1918 a chassis, No. 118458, was sent from the claimant's factory, consigned to the Army inspector of ordnance at the American Car & Foundry Co., Berwick, Pa.

5. Upon receipt of the chassis at the American Car & Foundry Co., Berwick, Pa., it was found that the muffler, which is a part of the chassis, was missing.

6. The chassis had been passed and accepted at the plant of claimant company by a Government inspector, and if the muffler was missing after shipment it was no fault of claimant company.

7. First Lieut. M. Pulford, Ordnance, by letter dated July 27, 1918, ordered claimant company to forward another muffler to the Army inspector of ordnance at the American Car & Foundry Co., at Berwick, Pa., on Government bill of lading.

8. On July 31, 1918, the muffler was duly inspected, passed, and accepted by Michael Lauersen, a duly authorized inspector acting under the direction of Lieut. Pulford, and was on the same day shipped on Government bill of lading as requested in Lieut. Pulford's letter of July 27.

DECISION.

1. When the muffler was delivered by claimant company and was inspected, passed, and accepted by the Government inspector at the plant of the company at Kenosha, Wis., a contract arose between the Government and the claimant, within the purview of the act of March 2, 1918, under which the claimant, Nash Motors Co., is entitled to the payment of this claim.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form C to the Claims Board, Ordnance Department, for action in accordance with this decision.

Col. Delafield and Mr. Hamilton concurring.

Cases Nos. 1658 and 2203.

In re CLAIM OF STARK ROLLING MILLS CO.

1. **PRICE REVISION BY FEDERAL TRADE COMMISSION.**—The term “the above prices are subject to revision by the Federal Trade Commission or other Government body” used in a contract for the manufacture of corrugated-steel sheets contemplates an equitable adjustment or revision. Therefore, where the claimant purchased material with which to perform his contract at the market price prior to the date the price of steel was reduced by order of the President, which material is actually used in the manufacture of the goods ordered, the action of the President in fixing the price of corrugated-steel sheets was not such a revision as was contemplated by the contract.
2. **CLAIM AND DECISION.**—Claim is made under requisitions Nos. 7563 and 9908 for the production of galvanized-steel sheets. The two cases were heard together and disposed of under one decision. Held, that claimant is entitled to relief and is entitled to have refunded it all sums deducted from vouchers for deliveries under said requisitions prior to December 1, 1918.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. These cases, Nos. 1658 and 2203, come to this Board on appeal from a decision of the Director of Purchase adverse to claimant. These cases were heard together and will likewise be disposed of under this one decision.
2. By requisitions bearing numbers 7563 and 9908, and dated September 21 and October 24, 1917, respectively, Lieut. Col. W. H. Rose, of the Engineer Corps, ordered from the claimant 6,247 tons of galvanized-steel sheets. The requisitions provided that the contract price should be \$8.30 per hundredweight, subject to revision by the Federal Trade Commission or other Government body. All material has been delivered and accepted, but there has been deducted from claimant's vouchers and withheld \$2.45 per hundredweight, in accordance with a Presidential proclamation of November 6, fixing the price of these sheets at \$5.85 per hundredweight. The revised figure was based, however, upon manufacturers being able to secure steel bars at a previously fixed price of \$51 per ton. The proof is to the effect that it was impossible to procure bars at such price, and that

the price in the contract of \$8.30 per hundredweight is a fair and reasonable one based upon prices claimant was compelled to pay for steel bars. After finishing the first requisition and partly completing the second, and on December 1, 1918, the claimant was finally able to secure bars at the Governmental fixed price, and so he makes no claim beyond the fixed price of \$5.85 per hundredweight after that time.

DECISION.

1. This case is similar in all respects to both the Apollo Steel Co. and the Newport Rolling Mills cases decided by this Board, and the decision in those cases will be followed here. In the Apollo case it was stated in the decision:

"The action of the President in fixing the price at \$5.85 per hundred pounds was not such a revision as was contemplated when the Government inserted in the procurement order No. 7562 the provision 'the above prices are subject to revision by the Federal Trade Commission or other Government body.' In the absence of a revision as was so contemplated, it is the opinion of this Board that the claimant is entitled to be paid a sum equal to the difference between \$8.30 per hundred pounds for the material delivered to and accepted by the Government under this order and such moneys as have already been paid to it on account of the purchase price of this material."

The claimant is entitled, therefore, to have refunded to him all sums deducted from vouchers for deliveries under requisitions Nos. 7563 and 9908 prior to December 1, 1918.

DISPOSITION.

1. This Board will cause the amount due claimant to be computed in accordance with the provisions of the supply circulars of the Purchase, Storage, and Traffic Division and a statutory award issued and when approved transmitted to the proper disbursing officer for payment.

Col. Delafield and Mr. Henry concurring.

Case No. 2397.

In re **CLAIM OF UNITED DISPOSAL & RECOVERY CO.**

- 1. SUBSTANTIAL PERFORMANCE—TERMINATION.**—Where the Government has substantially performed its part of a contract and the time for the performance of the contract has elapsed, the contract is terminated.
- 2. BREACH BY GOVERNMENT—FORMAL CONTRACT—JURISDICTION.**—Where, under the above circumstances, a formal contract has been terminated, the damages to which the contractor is entitled by reason of the breach by the United States are uncertain and unliquidated, and this Board has no jurisdiction to adjust the matter.
- 3. BREACH BY CONTRACTOR—FORMAL CONTRACT—JURISDICTION.**—Where a formal contract has been terminated, and it appears that the Government has a counterclaim against the contractor for a breach, this Board is without jurisdiction.
- 4. CLAIM AND DECISION.**—Claim presented in accordance with General Order 103, based upon two formal contracts for the removal of waste matter from Camp Custer and Camp Dodge. Held, the first contract was fully performed, and the second contract substantially performed, by the Government. The time for performance on both contracts has expired and has not been extended. This Board has no jurisdiction over the claim under either contract.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Orders, No. 103, War Department, 1918, under the following circumstances:

2. Two formal contracts were entered into between the claimant and the United States, both dated on or about August 27, 1917, one of which dealt with the removal of waste matter from Camp Custer, in Michigan, and the other dealt with the removal of waste matter from Camp Dodge, Iowa. The terms of these contracts are substantially identical with the contracts between Henry Knight & Son (Inc.), and the United States for the removal of waste from Camps Gordon, Johnston, Sherman, and Jackson, which are dealt with this Board under claim No. 1736.

3. There was a question raised as to the interpretation of the first clause of the contracts, which reads:

“I. The contractor agrees to purchase and remove all waste matter of every kind and nature, except rags, bags, manure, and cinders from Camp Custer, Michigan (Camp Dodge, Iowa).”

Our decision in respect to the construction of this language is the same as that in respect to the construction of the contracts between Henry Knight & Son (Inc.) and the United States, which are dealt with under our No. 1736. That construction is that the words "waste matter of every kind and nature, except rags, bags, manure, and cinders" means all such waste matter as is usually called "waste matter."

4. The facts as to the performance of this contract, however, are different from the facts that appear in respect to performance of the Henry Knight & Son contracts.

CAMP CUSTER, MICH.

The conclusions of the Inspector General's Department are that—

"1. That no waste material which accumulated prior to June 30, 1918, was sold by the salvage officer.

"2. That the contractor received all waste material due him under the contract.

"3. That the contractor refused to take some waste material which had no value.

"*Recommendations.*—Since I believe that the contractor received all material due him according to the contract, recommend that no action be taken."

The comment of the Judge Advocate General is:

"Nothing due the contractor. Counter claim of uncertain amount."

CAMP DODGE, IOWA.

The findings of the Inspector General's Department in respect to Camp Dodge are to the effect that the contractor received substantially all of the waste materials that accumulated during the life of the contract that it was entitled to. He stated in his report:

"(d) That of the articles due the United Disposal & Recovery Co., on hand on the 30th of June, 1918, when the contract expired, the following items were never delivered to that company, their values, as nearly as can be determined, being given:

574 pounds roachings, mane & tail, @ 14¢	\$80.36
1,300 pounds shoes, unrepairable; 1,750 pounds discarded soles & heels; 150 pounds misc. scrap leather; a total of 3,200 pounds scrap leather, @ \$20 per ton	32.00
Total	112.36

"(e) That of the items enumerated above, through some misunderstanding, some are now on hand and some have been sold to other concerns. Considerable quantities of bailing wire and empty bottles were also on hand, but had been tendered the United Disposal & Recovery Co., who, in violation of their contract, refused to receive or remove them because not profitable to them.

"5. The inspector concludes that there is now due the United Disposal & Recovery Co., under its contract terminating June 30, 1918, upon account of material due it and not delivered from Camp Dodge, one hundred twelve and 36/100ths dollars (\$112.36), and no more."

The report also sets forth a number of alleged violations of the contract by the contractor, including expense of removing bottles and baling wire, labor and fuel in burning garbage, and labor furnished by the Government in loading garbage on cars, a total of \$1,322.75, all of which it is concluded is a proper charge against the contractor. The comments of the Judge Advocate General are as follows:

"The contractor has a claim for undelivered waste the reasonable value of which is estimated by the inspector to be \$112.36. Claim must be filed with the Auditor for the War Department. Counterclaim of uncertain amount."

5. We have examined the evidence in the files, and it well warrants the conclusion which the Inspector General's Department has reached, viz: That the United States has fully performed its contract with the contractor in respect to Camp Custer, and that the amount to which the contractor would be entitled for waste matter at Camp Dodge that was not delivered to it is uncertain and estimated only, a part of such waste matter having been sold and a part otherwise disposed of. The evidence also shows that this contractor has failed in important respects to perform its Camp Dodge contract, thereby giving rise to a counterclaim against it on the part of the United States.

DECISION.

1. It appears from the record and the evidence before us that the United States has performed its contract with the contractor in relation to the removal of waste matter from Camp Custer, Mich., and that no relief can be given the claimant in respect to that contract.

2. It appears from the record and the evidence that the United States has substantially performed its contract with the contractor in relation to the removal of waste matter from Camp Dodge, Iowa, and that if there has been any failure by the United States it is a trifling one and one for which the amount to which the contractor is entitled, if it is entitled to anything, is small and also uncertain, being an estimated amount only. It also appears in respect to this contract that the contractor has substantially failed to perform its part of the contract, and that the Government has grounds for a counterclaim against it.

3. Both the Camp Custer and the Camp Dodge contract expired by limitation on June 30, 1918. The contracts provided that the contractor was entitled to waste matter that accumulated up to that

date. Both of these formal contracts have heretofore been completely terminated.

4. The claimant is entitled to no relief in respect to its Camp Custer contract, since the contract has been completely performed and is now terminated.

5. The contractor is entitled to no relief in respect to its Camp Dodge contract, since the contract has been terminated, the United States has substantially performed its contract, the damages to which the contractor is entitled by reason of the breach by the United States are uncertain and unliquidated, and for the further reason that the United States has a right of action against the contractor on account of its failure to perform its contract fully. This Board does not take jurisdiction of claims under formal contracts that have been terminated and where it appears that there has been a breach of contract on the part of the contractor.

Col. Delafield, Mr. Williams, and Mr. Shirk concurring.

Case No. 1924.

In re **CLAIM OF THE STARR PIANO CO.**

- 1. RESCISSION OF CONTRACT—JURISDICTION.**—Where a formal contract, in accordance with a provision thereof, was cancelled for contractor's default by the Government, a claims board has no jurisdiction to consider a claim presented by the contractor.
- 2. CLAIM AND DECISION.**—Appeal under General Order 103 from the decision of the Air Service Claims Board on a claim based upon a formal contract for airplane propellers. **Affirmed.**

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Air Service Claims Board, denying the claim for \$34,684.07 on a formally executed contract.

2. R. N. Denham, recorder of the Air Service Claims Board, states in a letter to this Board dated August 29, 1919:

“This claim is disallowed for the reason that the Board refused to take jurisdiction, because of the fact that the contract had been specifically cancelled and rescinded on account of default of the contractor as set forth in a letter to the contractor to that effect.

“By direction of the chairman of the Air Service Claims Board.”

3. On the 16th day of September, 1918 the claimant entered into a formal contract, No. 4677, order No. 720511, with the United States to manufacture and supply 500 cherry-wood propellers, in accordance with certain specifications, at \$72 each, making a total of \$36,000. The contract contains the following provision:

“ART. V. In the event of the failure of the said contractor to perform the stipulations of this contract within the time and in the manner specified herein, the Government may elect one of the following courses: (a) May rescind the contracts; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the Government of having the articles or equipment completed; (d) or may permit the said contractor to complete delivery within a reasonable time after the date or dates speci-

fied herein, and in this event liquidated damages shall be deducted as and if provided in the attached order."

4. The claimant proceeded with the manufacture of said propellers, and it soon became apparent that the glue joints were not perfect. The cause of said imperfection was not then known. The propellers thus made were not safe for service. On November 30, 1919, O. B. Mause, senior inspector of the Air Service, wrote the claimant, in part, as follows:

"It is the opinion of the writer that none of these propellers would be safe to be used in the service. You will therefore use this letter as your authority to discontinue production on order No. 720511 Aero until further notice has been received."

5. On January 13, 1919, Capt. F. B. Schnacke, by direction of the Acting Director of Aircraft Production, wrote the claimant as follows:

"Order No. 720511—Contract 4677.

"1. Owing to the fact that you have failed to perform the stipulation with reference to the delivery of the propellers called for by order 720511 and contract accompanying same, and on account of your failure to perform other stipulations of said contract within the time and in the manner specified therein, you are hereby notified that the Government has and does hereby elect to rescind said contract, and same is hereby accordingly rescinded."

6. The claimant has always contended that the condition of said propellers was due to faulty specifications and was not due to its negligence or bad workmanship. The Bureau of Aircraft Production continued to investigate the causes of the defects in the said propellers after January 13, 1919. Finally on May 24, 1919, the claimant filed its claim with the Bureau of Aircraft Production. The facts of said claim were further investigated and a form of settlement contract, covering the demands of the claimant, dated August 19, 1919, was drawn. The said settlement contract was never executed and the claim was denied for the reasons quoted in the letter of the recorder of the Air Service Claims Board, set forth in paragraph 2 hereof.

7. Since the claim was presented to this Board Mr. Guido Gores, attorney for the claimant, has presented letters from J. A. MacDonald, aeronautical engineer, formerly district manager of the Dayton District, and F. W. Caldwell, Chief of the Propeller Service, to the effect that it is their opinion the defects in the manufactured articles were not the fault of the claimant, and also a letter, dated February 3, 1919, from A. C. Downey to the claimant, stating, in part:

"You are advised that the officer in charge of the Procurement Division informed a representative of your company of the fact that your case would be thoroughly investigated and that an impartial

decision would be made without reference to any previous judgment passed by the Propeller or Propeller Inspection Sections of this department.

"* * * No decision adverse to your company will be rendered until such time as you have been afforded ample opportunity to present your side of the case."

8. Henry H. Tryon, chief propeller inspector of the Aircraft Service, during January and February, 1919, states in his affidavit of February 5, 1920, in effect, that the faults in the propellers manufactured by claimant were in part due to the failure of the claimant to manufacture in accordance with specifications.

DECISION.

1. We conclude, after an examination of the correspondence and affidavits and evidence submitted, that as the contract was rescinded by the Government in its letter to the claimant dated January 13, 1919, on the ground that the claimant had failed to perform its contract within the time and in the manner specified in the contract, the decision of the Air Service Claims Board should be sustained.

Col. Delafield and Mr. Eaton concurring.

Cases Nos. 438 and 477.

In re CLAIM OF LEHIGH NAVIGATION ELECTRIC CO. AND LEHIGH VALLEY TRANSIT CO.

1. **IMPLIED CONTRACT.**—When an agent of the Government in pursuance of his duty and authority directs the preparation of plans, specifications, and working drawings for the installation of facilities in order that work thereon may be commenced immediately upon execution of a contract, there is an implied contract to pay the necessary and reasonable cost of their preparation.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

1. These two cases were presented to the Claims Board, Ordnance Department, on Form A, but they were properly transferred by that board to the War Department Board of Contract Adjustment as being in their nature Class B claims under Supply Circular 17, and they will be treated and disposed of as such by this Board. As will hereafter appear, the Lehigh Valley Transit Co. stands in the relation of a subcontractor to the Lehigh Navigation Electric Co., and, by agreement between the claimants, the two cases were heard together, and a decision will be rendered as a claim solely on behalf of the Lehigh Navigation Electric Co. This case grows out of the following facts:

2. In August, 1918, the Bethlehem Steel Co. was engaged almost exclusively in the manufacture of munitions for the Government. In this work the Bethlehem Steel Co. was receiving under contract from the Lehigh Navigation Electric Co., located at Hauto, Pa., 7,500 kilowatts of firm, continuous power. It was the judgment of Gen. Tracy C. Dickson, Ordnance, United States Army, who represented the Ordnance Department at the Bethlehem plant in charge of all Government work, that within the ensuing six months at least 13,750 kilowatts of additional continuous, firm power would be needed by the Bethlehem Steel Co. in the manufacture of munitions. Gen. Dickson thereupon caused a survey to be made of the available sources of electrical power within practical range of the Bethlehem Steel Co. At the same time Maj. Malcolm MacLaren, Engineers, United States Army, who was attached to the War Industries Board and charged with the duty of developing and utilizing to the best advantage for Government work sources of electrical power in the

district between Washington and New York, made a survey also of the available and prospective sources of supply of electrical current in the district in which the Bethlehem Steel Co. was located. Gen. Dickson and Maj. MacLaren both reached the conclusion in the latter part of August, 1918, that in the ensuing six months a new and additional source of supply of electrical current must be developed to take care of Government needs at the Bethlehem plant.

3. Thereupon Gen. Dickson requested the Bethlehem Steel Co. and the Lehigh Navigation Electric Co. to furnish estimates of the cost and time of installation of new facilities necessary to the development of the additional power. The Bethlehem Steel Co. estimated that in one year's time it could construct a steam electrical power plant having a capacity of 30,000 kilowatts at a cost of \$3,011,000. The Lehigh Navigation Electric Co. estimated that it could furnish the 13,750 additional kilowatts of power by the installation of boilers at its Hauto plant in from 8 to 10 months and by the installation of a frequency changer at the plant of the Lehigh Valley Transit Co. at Allentown, Pa., in from 4 to 6 months, both at a total cost of \$1,747,000.

4. Under date of September 25, 1918, Gen. Dickson wrote the Chief of Ordnance submitting the two estimates and stating that 13,750 kilowatts of additional power would be necessary, and recommended that the proposition of the Lehigh Navigation Electric Co., in view of the time and amount involved, be adopted, and recommended also that the proposition be financed by the Government.

5. The proposition of the Lehigh Navigation Electric Co. to furnish the additional power by the installation of boilers at its Hauto plant and by the installation of the frequency changer system at the Allentown plant of the Lehigh Valley Transit Co. as the best means of furnishing the additional 13,750 kilowatts of electrical power, as recommended by Gen. Dickson, was approved by the Chief of Ordnance.

6. Negotiations were thereupon begun between the Bethlehem Steel Co. and the Lehigh Navigation Electric Co. on the one side and the Government agents on the other looking toward the formulation of a scheme that would provide these facilities and at the same time protect the interests of all parties, the Government, ultimately, to bear the expense of these additional facilities. The additional facilities as recommended and approved were to be of concrete instead of steel construction and therefore for temporary war purposes and were not of such a nature as to be of permanent or peace-time benefit to the Lehigh Navigation Electric Co.

7. During the pendency of these negotiations and after it appeared that they were practically certain of being carried through, Maj. MacLaren, acting in conjunction with Gen. Dickson, and in pursu-

ance of his duties in charge of the development of the additional needed supply of electrical power for Government work, directed the Lehigh Navigation Electric Co. to immediately prepare plans, specifications, and working drawings for the installation of the boilers at Hauto and for the frequency changer system at Allentown, with a view to being able to begin work upon these improvements immediately upon the completion of final negotiations and in order to save time, which was a vital element in the situation.

8. In pursuance of the direction of Maj. MacLaren, as above set out, the Lehigh Navigation Electric Co. prepared plans, specifications, and working drawings for the installation of the boilers at Hauto and the frequency changer system at Allentown, Pa., but the armistice intervened before negotiations for the establishment of these facilities culminated in an agreement, and the plans, specifications, and working drawings were left on the hands of the Lehigh Navigation Electric Co. and are of no benefit or value to them whatever, and this claim is to recover for the cost of their preparation.

DECISION.

This board is of the opinion that petitioner is entitled to recover the necessary and reasonable cost of preparation of the plans, specifications, and working drawings for the installation of the additional boilers at Hauto and for the installation of the frequency changer system at the Allentown plant of the Lehigh Valley Transit Co., which were made in pursuance of the direction of Maj. Malcolm MacLaren, Engineers, United States Army. This work was to be done for the sole benefit of the United States needful and necessary in the prosecution of its war needs, and the plans, specifications, and working drawings were to be and are of no value whatever to petitioner.

DISPOSITION.

This board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield, Lieut. Col. McKeeby, and Mr. Wise concurring.

Case No. 1488.

In re CLAIM OF FARRELL CHEEK STEEL FOUNDRY CO.

1. **CLAIM AND DECISION.**—Claim for \$51,633.10 under the act of March 2, 1919, for reimbursement for increased plant equipment on representation of Government agent that same would be compensated for by the Government. Held, claimant is entitled to relief.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$51,633.10, by reason of an agreement alleged to have been entered into between the claimant and the United States on or about the 15th day of October, 1918.

2. Maj. M. S. Loomis, in charge of procurement division of the Cleveland District Ordnance Office in October, 1918, was acting under instructions "to pursue any methods necessary to increase the production of tank parts" (p. 37). Track shoes for the caterpillar parts were especially needed (p. 37). Learning that the claimant was producing castings for said shoes, Maj. Loomis sent James C. Doyle to the claimant's plant with instructions to develop a plan by which production could be increased.

3. James C. Doyle, acting under the instructions of Maj. M. S. Loomis, called at the claimant's plant on the 22d day of October, 1918, and urged Herbert Farrell, president of the claimant's company, to increase the capacity of claimant's plant by installing melting and handling equipment. Mr. Farrell then asked, "What will happen if the war stops?" Mr. Doyle replied that if claimant made the additional installation of said machinery necessary to increase production, the Government would pay any legitimate expense necessary, but that he said nothing about a crane (p. 54).

- Lieut. George J. Eyrick, an inspector of ordnance of the Sandusky region, testified (pp. 65 and 66) that he heard the said conversation between Mr. Farrell and Mr. Doyle on October 22, 1918.

4. The installation of an electric furnace and electric crane by the claimant necessitated the building of a power line connecting the claimant's plant with an electric line about 2 miles distant, as the

local line was unable to supply more power at that time. Mr. Doyle took Mr. Farrell and Mr. Wilcox, of the Sandusky power line, to interview Andrew Clark, of the Procurement Division of the Ordnance, on October 31, 1918. Mr. Farrell asked Mr. Clark what the Government would do in relation to the installation of the proposed power line, and Mr. Clark replied that the claimant could make application for an appropriation for the proposed power line in writing, which could then be submitted to the Cleveland procurement department for approval or disapproval, and if approved could then be sent to Washington for the approval of the authorities there. Mr. Farrell finally stated he would finance the installation of the power line himself (p. 52).

5. On October 29, 1918, the claimant entered into an agreement with the Pittsburg Furnace Co. for the purchase of an electrical furnace at a cost of \$30,000, which was later installed. On November 4, 1918, the claimant entered into an agreement with the Sandusky Gas & Electric Co. to install the power line upon terms. On or about November 8, 1918, the claimant purchased an electric crane from the Milwaukee Crane & Electric Co. at a cost of \$9,092.

6. At the time of the armistice the claimant had subcontracts for Government work amounting to a total of approximately \$1,300,000. During October, 1918, it turned out \$200,000 worth of castings. At that rate, at the time of the armistice it had sufficient Government work to keep it running six or seven months. By the proposed increase of equipment the claimant expected to increase its output 40 per cent (p. 78) and expected to have its new equipment running within 60 days from the time ordered. After the armistice the claimant did not hurry with the installation of the new machinery. It was finally installed in February, 1919. After the armistice part of the claimant's orders were canceled. It nevertheless continued on Government work for three or four months after the armistice.

7. Mr. Farrell testified (p. 83) that at the time the claimant installed its facilities he assumed that the cost would be absorbed in part by the contracts the claimant had on hand and in part by additional contracts. "I did not figure that there would be any cause for reimbursement at all." When asked whether he made any endeavor to cancel the claimant's orders for the furnace, crane, and power line Mr. Farrell replied (p. 88), "We had orders going on and we did not know but what we would need them." He said (p. 90) that after the armistice, when part of the claimant's orders were cancelled, he thought he could have cancelled the orders for the said facilities, but that he had orders on hand sufficient to amortize practically all of the said facilities and he did not know but the claimant would need them.

DECISION.

1. On or about October 22, 1918, James C. Doyle, acting under the authority of Maj. M. S. Loomis, orally agreed with the claimant that if it would install additional melting and handling equipment in its plant at Sandusky, Ohio, the Government would repay any necessary legitimate expenditures therefor. Thereafter and before November 8, 1918, the claimant placed orders for an electric furnace and an electric crane, and installed the said facilities in said plant, in February, 1919. It expected to amortize the cost of said facilities, which it states, together with the power line, cost the total sum of \$51,633.10, from the subcontracts for castings for Army tractors it then had, and in part from additional orders for Government work it hoped to receive later.

2. The claimant continued work on the said subcontracts for three or four months after November 12, 1918. It seems some part of the cost of said facilities was absorbed under the said subcontracts.

3. The obligation arises upon the part of the Government to reimburse the claimant its losses on the necessary expenditures made in performing said agreement.

4. The agreement for melting and handling equipment does not include the expenditures for a power line. No agreement was made with relation to the installation of the power line.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Ordnance Department, for action in the manner provided in Supply Circular No. 17.

Col. Delafield and Mr. Harding concurring.

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Case No. 569.

In re CLAIM OF JACOB REED SONS.

1. **FACILITIES—AMORTIZATION.**—Where, in order to encourage increased production and better sanitary conditions, a duly authorized representative of the Government agrees with the manufacturer that if it will obtain a three-year lease on certain floor space, move its factory therein, and install additional facilities, the Government will furnish sufficient work so that the extra expense can be absorbed in orders for its product, there is an agreement within the meaning of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919 for damages caused by the Government stopping production of a manufacturing plant which has increased its facilities on the faith of promises by the Government that it will furnish sufficient orders for its product so that the additional cost may be amortized. Held, claimant entitled to an adjustment.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, for \$35,242.92, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. The claimant, Jacob Reed Sons, of Philadelphia, Pa., makes claim under the act of March 2, 1919, for reimbursement for expenditures made and obligations incurred for the lease of a building and for machinery and equipment installed therein, alleging that it was induced to make the expenditures and incur the obligations at the request of Mr. Benedict M. Holden, depot quartermaster at Philadelphia, Pa.
3. It appears that in the summer of 1918 the garment manufacturers of the Philadelphia district working on Government contracts were not able to keep production up to the demands of the Government. Some contractors were not giving satisfaction either as to quantity or quality of work turned out. They were considered undesirable by the officers of the Philadelphia depot. Claimant had been prior to, and was on, July 15, 1918 working on Government contracts for wool garments and was giving entire satisfaction as to

quality of work, but its production was limited because of lack of floor space. The depot quartermaster was anxious that claimant increase its production, it being his intention to discontinue giving orders to the undesirable manufacturers as fast as the desirable manufacturers were able to increase their production.

4. Prior to July 15, 1918, the Philadelphia depot quartermaster had issued instructions to Capt. John F. Clayton, Quartermaster Corps, chief of the inspection branch, clothing and equipage division, of the Philadelphia district, that all manufacturers working on Government contracts should provide a suitable stock room adjacent to the cutting room, and that all Government-owned goods should be kept therein under lock and key. Claimant's cutting room at 1424 Chestnut Street was inadequate to claimant's demands and to have converted a part of the cutting room into a stock room would have materially reduced claimant's production. There was no other room available for a stock room. Another reason why the officers of the Philadelphia depot desired that claimant secure another location for its plant was that the sanitary conditions of the plant at Eighth and Arch Streets were unsatisfactory and the building was considered a firetrap.

5. For the reasons above stated claimant's president, Mr. Irving L. Wilson, had been repeatedly urged and requested, both by the depot quartermaster and by Capt. William Brooks, officer in charge of the manufacturing branch, clothing and equipage division, of the Philadelphia district, to secure larger and more suitable quarters and equip the same for the purpose of filling Government orders and to close its plant at 1424 Chestnut Street.

6. On July 15, 1918, claimant's president informed the depot quartermaster that he then had an opportunity to lease the eighth floor of the building at 44-50 North Sixth Street, but that it would be necessary to sign a lease for three years. Mr. Wilson further stated to the depot quartermaster that he was not desirous of undertaking a proposition that would require his company to assume obligations as large as this would necessitate without definite assurance of a volume of Government orders sufficient to keep the plant busy until the cost of the new plant had been absorbed out of the profits. The depot quartermaster replied that claimant would be given Government orders to keep the plant busy for at least the entire period of the lease and even longer, perhaps five years, and requested Mr. Wilson to negotiate the lease and install the machinery and equipment.

7. Acting upon these definite assurances, claimant, on July 23, 1918, leased the floor above referred to, and as soon thereafter as possible installed new equipment and machinery, built the stock room, and

closed its plant at 1424 Chestnut Street. The new plant was in operation by the middle of September, 1918, and it was kept busy on Government orders as long as the requirements of the Government continued, which was until shortly after the armistice. When the requirements of the Government ceased, claimant had no further need for this plant, so the machinery and equipment was disposed of and the premises were sublet for the remainder of the term.

DECISION.

1. An agreement was entered into on or about July 15, 1918, under which claimant was to lease a plant and install machinery and equipment for the manufacture of wool garments for the Government, and claimant was to be given Government Orders sufficient to keep it busy until the cost of the plant had been absorbed by the profits earned.

2. Claimant made expenditures and incurred obligations upon the faith of this agreement, prior to November 12, 1918, but did not receive orders sufficient to amortize the cost thereof.

3. Claimant is entitled to be reimbursed the loss it has sustained by reason of the failure of the Government to perform its part of the agreement above stated.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Maj. Taylor concurring.

Case No. 2169.

In re **CLAIM OF EASTMAN KODAK CO.**

- 1. RESCISSION OF AGREEMENT BECAUSE OF MISTAKE.**—Where a contractor and a Government officer agreed that a formal contract should be cancelled and execute a cancellation agreement under a mutual mistake of fact, both parties believing that no expenses had been incurred thereunder, the cancellation agreement will be rescinded and the original contract considered as subject to settlement.
- 2. CLAIM AND DECISION.**—Claim is made under General Order 103 under a formally executed contract for the manufacture of aerial lenses, for the sum of \$1,567.95 for expenditures made in partially performing the contract. Held, that the Secretary of War has power to adjust said claim.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Air Service Claims Board on a claim for \$1,567.95 on a formally executed contract under the following circumstances. No hearing has been had before this Board.

2. Contract No. 4212, Order No. 74002, between Lieut. (now Capt.) F. D. Schnacke, Air Service, Signal Reserve Corps, acting for the United States, and the claimant, dated July 8, 1918, was duly executed by both parties. It provided for the delivery by claimant to the Government of 25 aerial lenses at \$390 each.

3. On November 26, 1918, a telegram was sent to claimant, signed "Aircraft Production, Schnacke," requesting claimant to stop all production over and above 5 lenses, but to continue with 5 lenses. On December 14 a similar telegram was sent it directing the suspension of the entire order. Under date of December 16, 1918, a letter was sent the Bureau of Aircraft Production, signed with the claimant's name, by F. O. Strowger, referring to the telegram of November 26, and stating:

"As no work has been done on any of the lenses on this order, consequently no expense incurred, you are advised that this order is hereby cancelled."

Capt. Schnacke replied by letter that the order was accordingly thereby canceled.

4. Subsequently the claimant discovered that work had been done on these lenses and so notified the department. On November 19,

1919, Lieut. W. L. Miller, Air Service, Aircraft Production, wrote claimant as follows:

"In view of the understanding that a claim is to be presented in this case, and the fact that such claim can not be considered when the order is not in full standing, the cancellation of December 19th, referred to above, is hereby rescinded."

5. The claim appears to have been examined and the amount computed at \$1,567.95. It was rejected, apparently upon the theory that the Secretary of War had lost jurisdiction by the agreement of both parties that the contract should be cancelled.

6. An affidavit filed by James S. Havens, one of the vice presidents of the claimant, states that F. O. Strowger, whose name is signed to the letter suggesting the cancellation of the contract, is an employee of the claimant who had no authority to cancel the contract.

7. The affidavit of Mr. Havens further sets forth that the claimant has settled in full certain claims of the Government against it, a memorandum of which is attached to the record by way of notice.

DECISION.

1. The sole question is whether the Secretary of War lost jurisdiction to settle or adjust the contract with the claimant when the letter signed by Mr. Strowger offering cancellation was answered by Capt. Schnacke, notifying the claimant that the order was cancelled.

2. It appears that Mr. Strowger had no authority to bind the claimant by any agreement to cancel the contract. Whether he had such apparent authority as made his settlement binding on the claimant need not be decided.

3. If we should assume that Mr. Strowger had such apparent authority, we should have here an agreement between the United States and the claimant whereby the latter released to the former a debt of \$1,567.95, neither party intending that this should be done and neither being aware of the existence of the debt. In such case the agreement for cancellation is subject to rescission.

4. Until the party entitled to rescind a cancellation agreement loses his right so to do, the agreement does not finally dispose of the contract it purports to cancel.

5. Rescission was made in apt time, and was assented to, and, accordingly, the Secretary of War never lost jurisdiction. Claimant is entitled to relief.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for appropriate action.

Col. Delafield and Lieut. Col. Carruth concurring.

Case No. 1803.

In re CLAIM OF SINGER MANUFACTURING CO.

1. **INTEREST UNDER SPECIAL AGREEMENT.**—Where, under a formal contract for certain articles, it was provided that the Government was to pay for increased facilities, and the Government agreed in writing to pay interest on money advanced by the contractor for these facilities for periods beyond the time specified under the formal contract, the contractor is entitled to interest even though the formal contract contained no provision regarding interest.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a written agreement relating to interest on money advanced by claimant for facilities under a formal contract for recuperators and other ordnance. Held, claimant is entitled to relief.

Mr. Bayne writing the opinion of the Board.

This is a claim, Class A, for \$33,970.45 for interest on moneys advanced by claimant under a special agreement with the Government in carrying out a formal contract with the Government, War Ordinance No. P4560-454C, dated March 29, 1918. The claim comes to this Board from the Claims Board of the Ordnance Department.

There has been no hearing.

This Board finds and decides as follows:

1. The Government, acting through Lieutenant Colonel Dale Bumstead, Ordnance Department, United States Army, by direction of the Chief of Ordnance, and claimant entered into a formal contract, War Ordinance No. P4560-454C, dated March 29, 1918, whereby the claimant agreed to provide increased facilities for the performance of the contract, to make necessary rearrangement of its plant and machinery at Elizabethport, N. J., and to provide the proving ground, the estimated cost of which was approximately \$4,375,819, to be paid by the Government. Such cost was not to be exceeded unless the additional cost should be specifically authorized in writing by the Chief of Ordnance. Payment for all costs figured by the contractor to be made upon certificate to the Chief of Ordnance as soon as practicable after the 1st and 15th of each month. The articles to be manufactured were: 2,500 hydropneumatic recuperators, 2,500 independent line-sight mechanism, and 5 dummy cradles.

2. On April 1, 1918, before the receipt of the purchase order and the contract, No. P4560-454C, claimant wrote Procurement Division, Office of Chief of Ordnance, that no provision was made in the contract for interest on the large sums of money which would have to be advanced by claimant; that orders and contracts had already been placed by claimant amounting to about \$2,000,000, and sug-

gested that the Government advance such capital as required week by week. On April 5, 1918 this letter was acknowledged and claimant was informed that it had been referred to the Cost Accounting Section. On April 22, 1918, claimant wrote again to the same division, acknowledging receipt of the procurement order, No. P4937-489C, dated March 29, 1918, but received by claimant April 19, 1918; claimant requested answer to its letter of April 3. On April 23 the Acting Chief of Ordnance wrote claimant that interest would be allowed; but the rate not being specified, claimant on April 25, 1918 wrote that as the rate of interest was not specified, claimant assumed that 6 per cent was the rate agreed upon, which was confirmed by the Ordnance Department by letter of May 23, 1918.

3. This arrangement, thus evidenced in writing by the letters between the parties, and prior to the actual delivery of the instrument evidencing the contract, No. P4560-454C, was, and was intended to be, apart from and independent of the contract, and was not inconsistent therewith, and was intended to provide for a contingency not otherwise provided for which might arise, and was necessary for the protection of claimant, and was beneficial to the Government in avoiding possible delays incident to its own failure to act promptly under the formal contract.

4. It appears that claimant, owing to delays by the Government in making the payments authorized and required by the contract, No. P4560-454C, was required to take funds of its own in order to carry out said formal contract, and claimant did so, relying upon the letters above referred to containing the agreement to reimburse the claimant for such use of its funds by paying the claimant interest thereon during the time said funds were so used for the Government's benefit.

DECISION.

1. Claimant having, pursuant to said agreement with the Government, employed its own funds for periods beyond the times stated in said contract, No. P4560-454C, the Government is now under an obligation to pay claimant the interest accrued on said moneys so advanced by it for said periods.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hunt concurring.

Case No. 1200.

In re CLAIM OF FULLER CANNERIES CO.

1. **UNITED STATES FOOD ADMINISTRATION'S BULLETIN—ADOPTION BY WAR DEPARTMENT.**—Where bulletins issued by the United States Food Administration provide for the payment of insurance and storage from December 1, 1918 on goods not ordered shipped prior to that date, with interest from December 1, 1918 on payments made therefor after that date, and such bulletins were adopted by the War Department, purchase orders thereafter issued by the War Department for allotments made by the United States Food Administration are subject to the provisions of such bulletins.
2. **ACCEPTANCE—DELIVERY.**—Where the purchase order requires that "All goods must be satisfactory to the purchasing quartermaster" and by reason of claimant's refusal to accept the quartermaster's grading shipments are delayed, interest will be allowed only from the date when it accepted the quartermaster's grading (in this case Jan. 4, 1919) and storage and insurance will be allowed only from the date when the claimant notified the Government that the goods were ready for shipment (in this case Jan. 27, 1919).
3. **DISCOUNT.**—Where such goods or any part of them were delivered to and accepted by the Government, payments for the same by the Government were not subject to discount for cash where it was not expressly provided for in the contract.
4. **CLAIM AND DECISION.**—This claim for \$595.70 arises under the act of March 2, 1919, for storage and insurance on tomatoes, interest on tentative payments, and for refund of discount alleged to have been erroneously made. Held, that there was no contract in this case which authorized deduction of discount and that claimant should be reimbursed therefor. Also held that claimant is entitled under the terms of the United States Food Administration bulletin adopted by the War Department, to storage and insurance on 3,726 cases of tomatoes from January 27, 1919, and interest on tentative payments made from the date of January 4, 1919.

Mr. Harding writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$595.70 by reason of an agreement alleged to have been entered into between the claimant and the United States. On September 28, 1918 the United

States Food Administration issued to the claimant an allotment covering 45 per cent of claimant's entire season's pack of tomatoes, which was subsequently found to be 4,500 cases. Subsequently, and on October 3, 1918, a purchase order was issued to and accepted by claimant, which provided, among other things, that the tomatoes should be of Standard grade; that the provisional unit price should be \$1.50 per dozen; that delivery should be f. o. b. at the point of origin; and that shipping directions should follow. The purchase order also had in it a provision (5):

"All goods must be satisfactory to the purchasing quartermaster."

The correspondence shows that these tomatoes were ordered for almost immediate delivery, at least "before cold weather begins."

2. The actual number of cases to be delivered was fixed at 4,500 cases on or about October 9, 1918, and the contractor asked that it be permitted to submit samples and that shipping instructions be issued as soon as furnished with purchase order number, and claimant immediately entered upon performance of the contract.

3. Samples were submitted and almost immediately a controversy arose between the Government and the contractor as to the grading of the tomatoes, the contractor insisting that a large part of the output was above the grade called for—that is to say, that it was Extra Standard instead of Standard—and the Government contending that none of the output was above Standard and that it was ready to receive these tomatoes as Standard and as per purchase order. The controversy lasted from some time in October until the 20th of November, when the Government, seeing that it was making no headway with the contractor, wrote a letter on that day, November 20, 1918, in part as follows:

"This office is of the opinion that the tomatoes which you grade as Extra Standard are but a very fair Standard, and those which you grade as Standard are not up to the proper requirements. Because of this fact you are hereby released from supplying * * * canned tomatoes from your South Dayton, New York factory, and you are at liberty to dispose of these articles on the open market."

This letter was acknowledged by the claimant under date of November 22, 1918, as follows:

"Replying to your favor of the 20th instant, we note your advices contained in this letter releasing us from supplying any canned corn or tomatoes and giving us the privilege of disposing of them through regular channels."

In accordance with the above letter, on December 2, 1918, the Government sent to the claimant a form of release and asked the contractor to sign it, and again on December 9, 1918, asked the contractor to sign and forward the release.

4. In the meantime the contractor had, by sales and otherwise, reduced the number of cases allotted to it from 4,500 cases to 3,786, but notified the Government on December 12, 1918, that it would not sign the release but was still ready to deliver the 3,786 cases still on hand, and on December 14, 1918, the Government notified the contractor that it still would accept the amount of tomatoes that claimant had on hand at the grading which the Government had placed upon them. The claimant still contended for its grading, but the correspondence in the end resulted in the claimant accepting the grading of the Government on January 4, 1919, and asking for prompt shipping instructions, and on January 27, 1919, the claimant notified the Government that the tomatoes were ready for delivery and shipping instructions followed on February 11, 1919.

5. At the time the contract was made for the purchase of these tomatoes there was in existence a circular bulletin issued by the United States Food Administration which allowed interest on tentative payments on and from December 1, 1918, to the dates of payments. Tentative payments on this contract were \$4,608 on March 13, 1919, and \$6,750 on March 20, 1919. The Government received all of the tomatoes which were shipped, to wit, 3,786 cases, and the Government paid for the same at a price which was accepted by the claimant, but in making one of the payments it deducted from the remittance the sum of \$170.33. Claimant contends that this discount was wrongfully deducted and made its claim against the Government as follows:

Cash discount wrongfully deducted-----	\$170.33
Storage and Insurance on 3,786 cases, from Dec. 1, 1918, to Feb. 11, 1919, three months, at 2¢ a case, per mo., as per U. S. Food Admin. Bulletin # 11, par. 4-----	227.16
Interest on tentative payments, \$4,608, from Dec. 1, 1918, to Mar. 13, 1919, 102 days-----	77.22
\$6,750.00, Dec. 1, 1918, to Mar. 1, 1919, 109 days, at 6% per annum----	120.99
Total-----	595.70

6. This claim is considered and decided in connection with claim No. 1479 between the same parties for a sum in which a question arises as to the payment of interest on tentative payments.

DECISION.

1. The item of \$170.33 cash discount was erroneously deducted by the zone finance office under date of October 7, 1919, and must be allowed to the contractor (23 Comp. Dec. 141):

"In general, the deduction of discounts under agreements by the Government to purchase supplies is authorized only when the vendor has made an express offer of such discount, and a mere statement as

to discount shown on the printed commercial bill of the vendor submitted for payment is not generally to be regarded as such express offer."

Also the Director of Finance states:

"When it is claimed by contractors or dealers that cash discount has been erroneously collected, the contract or agreement will be carefully examined, and if no discount has been expressly offered or agreed to, or if the account was not paid within the time limit and it is definitely determined that the discount was erroneously collected, refund may be made," etc.

There was no agreement for discount on the part of the contractor in this case.

2. As to the next item of \$227.16 for storage and insurance, we observe as follows:

The bulletin of the United States Food Administration, adopted by the War Department, provides for payment to the contractor of insurance and storage for the fixed date of December 1, 1918, on all goods purchased that were not shipped prior to December 1, 1918, and, had no controversy arisen in this case between the contractor and the Government the contractor would have been allowed an item for insurance and storage from December 1, 1918. But it must be borne in mind that, in accordance with the contract of purchase, the Government reserved the right to fix the standard of the tomatoes purchased by putting into the purchase order:

"All goods must be satisfactory to the purchasing quartermaster"; and in the end the contractor accepted the grading of the Government, on January 4, 1919, instead of accepting from the Government a release of its contract which it might have done if it had so elected. It must be said, then, that this item of storage and insurance was caused by the act of the contractor in not accepting, when and as made, the decision of the Government as to the grading of these tomatoes. The contractor, therefore, is not entitled to payment upon the item of payment in full of \$227.16, but it would be a fair and equitable adjustment to allow to the contractor storage and insurance computed from January 27, 1919, the date on which the claimant notified the zone supply officer that the accepted lot of tomatoes was ready for delivery.

3. The same reasoning applies to the items of \$77.22 and \$120.99, claimed for interest on the tentative payments. The delay in receiving these payments was caused through the act of the claimant in not accepting the gradings, and, therefore, it would be fair and equitable to the claimant to allow to it interest at 6 per cent per annum on the tentative payments, dated from January 4, 1919, when it

accepted the grading of the Government and asked shipping instructions.

DISPOSITION.

This Board will cause the amount due to the claimant to be ascertained and computed in accordance with this decision and the provisions of the supply circulars of the Purchase, Storage, and Traffic Division, and will make the statutory award and cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Hamilton concurring.

Case No. 763.

In re CLAIM OF FRED T. LEY & CO. (Inc.).

1. **CONTRACT, CONSTRUCTION OF—TRAVELING EXPENSES—TELEPHONE CALLS.**—Where a cost-plus percentage contract for the construction of a cantonment provides that items of expense approved by the contracting officer, incident to the maintenance and operation of a commissary, are proper items of cost, necessary traveling expenses, telephone charges and other items of expense of contractor's agents, in getting together equipment, waiters, etc., for the commissary, are within the terms of such contract provisions.
2. **CLAIM AND DECISION.**—Appeal from the Accounting Section of the Construction Division. Claim under General Order 103 for traveling expenses, telephone charges and other items of expense incident to obtaining equipment and employees for a commissary. Held, such items are proper charges which the contractor should be reimbursed, but the justness of the charge should be determined by the proper bureau board.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Accounting Section of the Construction Division on a claim for payment of certain items amounting to \$500.81, on a formally executed contract as hereinafter appears.

2. The case was heard on January 15, 1920, and the claimant was represented at the hearing.

3. Under date of June 11, 1917, the claimant entered into a contract with the Government for the construction at Ayer, Mass., of—"buildings and other utilities, except roads, stoves, bunks, mattresses, ranges, and refrigerators, for an Infantry division," including certain additional units.

4. The cantonment was named Camp Devens. It contained about 10,000 acres. The contract included something over 1,500 buildings, and as many as 9,000 men were at times working on the job. The total expense involved amounted to about \$10,000,000.

5. There were at Camp Devens, either existing or in course of construction, 20 miles of wagon road and about 4½ miles of railroad.

6. The contractor was notified on June 11 that a contract would be given it, and the contract was received and executed about three weeks later.

7. Upon being notified that it would receive a contract the contractor immediately started work.

8. Maj. Edward Canfield, Jr., was the constructing quartermaster at the location at that time, and as such had immediate control and supervision of the construction of the cantonment.

9. The provisions of the contract relating to what should be done thereunder are as follows:

“ARTICLE I. *Extent of the work.*—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies, and do all things necessary for the construction and completion of the following work:

“At Ayer, Massachusetts: Buildings and other utilities, except roads, stoves, bunks, mattresses, ranges, and refrigerators, for an Infantry division,” etc.

“ARTICLE II. *Cost of the work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer, and as are included in the following items:

“(g). Buildings and equipment required for necessary field offices, commissary, and hospital, and the cost of maintaining and operating said offices, commissary, and hospital, including such minor expenses as telegrams, telephone service, expressage, postage,” etc.

10. As the performance of this part of this contract, and with the approval of Maj. Canfield, the claimant entered into a contract with Baldwin's (Inc.), whereby the latter was to run the commissary at the plant on a cost-plus basis, for a fee of \$15,000.

11. The amounts claimed in the present case were expenses incurred by Baldwin's (Inc.) in connection with starting and running the commissary, for which it had been paid by the claimant. The claimant is now seeking reimbursement. The items are for the traveling expenses of Messrs. Baldwin and their agents in getting together their equipment, waiters, etc.

12. The bill was originally disapproved because it contained items which Maj. Canfield refused to approve. These items have been eliminated, and Maj. Canfield testified that he considered the present items proper charges.

DECISION.

1. We find that the claimant could properly reimburse Baldwin's (Inc.) for expenses such as are claimed in the present bill, and that the claimant should be reimbursed for all expenses so paid. We do not undertake to find what, if any, expenditures were thus made

by the claimant, as that is a matter to be determined by the board which will arrange the settlement.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, Washington, D. C., for appropriate action.

Col. Delafield and Lieut. Col. Carruth concurring.

Case No. 1646.

In re **CLAIM OF PICKANDS, BROWN & CO.**

1. ALLOCATION BY WAR INDUSTRIES BOARD—IMPLIED AGREEMENT.—

Where pig iron required by a certain manufacturer for war purposes was allocated to claimant at its request by the War Industries Board, such action in itself did not amount to an agreement under the act of March 2, 1919, to protect claimant against loss by reason of such allocation. An agreement is not to be implied from the mere fact that that Board was in a position to enforce compliance with its allocations.

2. SAME—EXPRESS AGREEMENT.—Where there was no statement that constituted an agreement on the part of any person acting under the authority of the President or the Secretary of War, and not even any expectation on claimant's part that the Government would be in any way responsible for payment by the manufacturer, claimant is not entitled to relief under the act of March 2, 1919.

3. CLAIM AND DECISION.—Claim under the act of March 2, 1919, based upon an allocation of pig iron by the War Industries Board. Relief denied.

Mr. Patterson writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim (upon Form A) has been filed, and referred to this Board for action by War Department Claims Board, July 23, 1919.

FINDINGS OF FACT.

The Board finds the following to be the facts:

I.

The American Iron & Steel Institute is an organization of steel manufacturers. It keeps statistics of production of the industry in the United States, and is closely allied to similar associations in Europe. By reason of its existing organization, facilities, and statistics, it was the agency made use of by J. Leonard Replogle, director of steel supply, War Industries Board, for the allocation of iron and steel to manufacturers requiring those commodities for the performance of Government contracts and otherwise. It was acting as such at the times hereinafter mentioned.

II.

In the latter part of October, 1918 the Director General of Military Railways placed with the American Car & Foundry Co. verbal orders for the construction of 8,300 railway cars for the military

railways in France. On October 31, 1918, said American Car & Foundry Co. wrote the railway equipment section, War Industries Board, stating that it required 2,279 tons of pig iron for delivery at Madison, Ill., and 490 tons of pig iron for delivery at Chicago, Ill. A copy of this letter was transmitted to Maj. William M. McCleary, Ordnance Department, Army representative, steel commodities section, War Industries Board. Maj. McCleary on November 4, 1918, referred the application to Mr. Repogle, who in turn, on November 5, 1918, wrote H. G. Dalton, chairman of subcommittee on pig iron, etc., American Iron & Steel Institute, handing him allocation requests No. 1532 for the 2,279 tons of pig iron and No. 1535 for the 490 tons required by the American Car & Foundry Co. These requests allocated both lots to claimant. On the same day Mr. Repogle notified Maj. McCleary by letter of his said action.

III.

On or about November 7, 1918, H. G. Dalton, aforesaid, sent the following letter to claimant:

AMERICAN IRON & STEEL INSTITUTE,
800 WESTERN RESERVE BUILDING,
Cleveland, Ohio, Nov. 7, 1918.

PICKANDS, BROWN & Co., *Agts., Chicago, Ill.*

GENTLEMEN: We have allocated to you the following:

Name of consumer: American Car & Foundry Co.

Address: 165 Broadway, New York City.

Delivery point: Madison, Ill.

Tonnage: 2,279 tons; grade, malleable.

Time of delivery: Equal monthly, Dec., Jan., Feb.

Analysis specified on allocation request:

Silicon, 1.00 to 1.50.

Sulphur, .05 max.

Phosphorus, .20 max.

Manganese, .80 max.

Governmental agency authorizing request: Ordnance Dept.

Remarks: The director of steel supply has been asked to have formal order sent to you promptly, and your earnest cooperation in taking care of this important business will oblige,

Yours, very truly,

(Signed) H. G. DALTON,
*Chairman Pig Iron, Iron Ore & Lake
Transportation Subcommittee.*
By W. E. B.

Allocation #1532.

On the same day Mr. Dalton sent another letter to claimant identical in all respects with the one set forth above, with the exceptions of the delivery point, tonnage, and allocation number, which in this letter were, respectively, Chicago, Ill., 490 tons, and No. 1535.

IV.

On or about November 12, 1918, Maj. McCleary, aforesaid, sent the claimant the following letter:

Geo. S. Bowman.

PMB/hcs

Nov. 12, 1918 [written by hand].

PICKANDS, BROWN & Co.,

Agents, McCormick Building, Chicago, Ill.

GENTLEMEN:

Subject: Pig iron for American Car & Foundry Co., 165 Broadway, New York, Request #1532—Authorization.

1. I am directed by the Chief of Ordnance to inform you that the following pig iron has been allocated for shipment to American Car & Foundry Co., Madison, Ill.:

Tons: 2,279.

Grade: Malleable.

Delivery desired: Equal Dec., Jan., and Feb.

Specifications:

Sil., 1.00 to 1.50.

Sul., .05 max.

Phos., .20 max.

Mang., .80 max.

2. The Raw Materials Section, Procurement Division, requests that you consider this letter as authorization to enter the formal order of American Car & Foundry Co. for the pig iron allocated on request #1532.

Respectfully,

RAW MATERIAS SECTION,

W. M. McCLEARY,

Major, Ord. Dept., U. S. A.

By H. C. PHIPPS,

Capt., Ord. Dept., U. S. A.

V.

On or about the same date, November 12, 1918, Maj. McCleary sent the following letter to the American Car & Foundry Co.:

Geo. S. Bowman.

PMB/hcs.

AMERICAN CAR & FOUNDRY Co.,

165 Broadway, New York, N. Y.

GENTLEMEN:

Subject: Pig-iron requirements. Request #1532—Authorization.

1. I am directed by the Chief of Ordnance to inform you that we have authorized Pickands, Brown & Co., agents, McCormick Bldg., Chicago, Ill., to accept your order for pig iron.

Tons: 2,279.

Grade: Malleable.

Delivery desired: Equal Dec., Jan., and Feb.

Specifications:

Sil., 1.00 to 1.50.

Sul., .05 max.

Phos., .20 max.

Mang., .80 max.

for shipment to you at Madison, Ill.

2. Your formal order should be forwarded accordingly to cover the pig iron allocated as above on Request #1532.

Respectfully,

RAW MATERIALS SECTION,

W. M. McCLEARY,

Major, Ord. Dept., U. S. A.

By H. C. PHIPPS,

Capt., Ord. Dept., U. S. A.

And on the same day Maj. McCleary sent another letter to the American Car & Foundry Co., identical in all respects with the one set forth above, with the exceptions of the number of tons, delivery point, and allocation number, which in this letter were respectively 490, Chicago, Ill., and No. 1535.

VI.

On or about November 12, 1918 the Director General of Military Railways directed the issuance of "hold instructions" on all materials not delivered for freight cars on orders for said military railways. These instructions were communicated to American Car & Foundry Co. and confirmed by letter of November 15, 1918, signed by S. M. Felton, Director General Military Railways, by J. Milliken, Colonel of Engineers.

VII.

On or about November 14, 1918, claimant sent the following letter to the American Car & Foundry Co.:

PICKANDS, BROWN & COMPANY.

PIG IRON, IRON ORE, & COKE.

332 SOUTH MICHIGAN AVENUE,

Chicago, Nov. 14, 1918.

K-S

AMERICAN CAR & FOUNDRY CO.,

W. E. HEDGCOCK, Pub. Agent,

165 Broadway, New York.

GENTLEMEN: In accordance with instructions received from the War Department we are enclosing herewith our contract in duplicate for 2,279 tons of Federal Mall. Bess. pig iron for shipment to your Madison plant, this tonnage to apply on Allocation #1532.

Will you kindly execute and return one copy of this contract to us promptly?

Yours, very truly,

PICKANDS, BROWN & Co., ORDER DEPT.

And on the same date it sent another letter to said American Car & Foundry Co., identical in all respects with the foregoing except as regards the number of tons, delivery point, and allocation number, which in this letter were, respectively, 490, Chicago, Ill., and No. 1535.

VIII.

On November 26, 1918, the Director General of Military Railways aforesaid notified the American Car & Foundry Co. by letter that the cars for which the said iron was allocated as aforesaid would not be required by the American Expeditionary Forces and that there would be no occasion to build any of them.

IX.

On November 26, 1918, claimant wrote W. E. Hedgcock, purchasing agent American Car & Foundry Co., New York City, that the contracts forwarded them on November 15 (evidently referring to the contracts inclosed in claimant's two letters to American Car & Foundry Co. dated Nov. 14, 1918) had not been received signed, and requesting the return of an executed copy of each contract promptly.

X.

On November 29, 1918, W. E. Hedgcock aforesaid sent the following letter to claimant:

AMERICAN CAR AND FOUNDRY COMPANY,
165 BROADWAY, NEW YORK,
Nov. 29th, 1918.

Please refer to file No. W. E. H.
PICKANDS, BROWN & COMPANY,
Mr. R. J. KROGMAN, Order Dept.,
339 So. Michigan Avenue, Chicago, Ills.

DEAR SIR: I am in receipt of your letter of the 26th, in which you made inquiry regarding contracts Nos. 6279 and 6280. The pig iron covered by these contracts was allocated to us by the director of steel supply, to be used in the manufacture of the wheels for the cars ordered by the military railways of France. The Director General of Military Railways has now instructed us to hold up all work and material required for these cars, and, therefore, until we receive a release, we will not require this pig iron. We are in hopes that the order will be released, but, of course, we have no definite information as to what disposition will be made of them.

We will advise you as soon as we hear.

Yours, truly,

(Signed)

W. E. HEDGCOCK,
Purchasing Agent.

XI.

On or about December 2, 1918, claimant sent the following letter to the American Car & Foundry Co.:

PICKANDS, BROWN & COMPANY,
PIG IRON, IRON ORE & COKE,
332 SOUTH MICHIGAN AVENUE,
Chicago, Dec. 2nd, 1918.
BTB-L
AMERICAN CAR & FOUNDRY COMPANY,
Mr. W. E. HEDGCOCK, P. A.,
165 Broadway, New York, N. Y.

GENTLEMEN: Replying to your favor of the 29th, the Government allocated a certain quantity of pig iron to be shipped to you, and contracts were mailed you for your acceptance covering this allocation, embodying the specification of pig iron which they instructed us to deliver to you.

The position in which we stand is that this tonnage has been practically commandeered by the Government for shipment to you, and constitutes an obligation on our part to deliver and on your part to accept, and acting under advice from the American Iron & Steel Institute committee, we are not cancelling any contracts.

Yours, truly,

(Signed)

PICKANDS, BROWN & Co.,
B. T. BACON, Sales Agent.

And on or about December 4, 1918, the American Car & Foundry Co. replied to the last foregoing letter as follows:

AMERICAN CAR & FOUNDRY COMPANY,
165 BROADWAY, NEW YORK,
December 4th, 1918.

Please refer to file No. W. E. H.

PICKANDS, BROWN & Co.,
Mr. B. T. BACON, Sales Agent,
332 S. Michigan Ave., Chicago, Ill.

DEAR SIR: I am in receipt of your letter of the 2nd, regarding pig iron allocated to us for use in the manufacture of wheels for the cars originally ordered for the military railways of France. There has been no change in the situation since our letter of November 27th, and until the order is released we, of course, can not send you our order for the pig iron.

Yours, truly,

(Signed)

W. E. HEDGCOCK,
Purchasing Agent.

CONCLUSION.

It is not thought that the action of the War Industries Board through its agent, the American Iron & Steel Institute, in making the aforesaid allocations to claimant amounted to an undertaking or agreement to pay claimant for the material so allocated or to protect it against loss by reason of such allocation, or gave rise to any contractual relation whatever between the claimant and the United States of America. The War Industries Board in assuming control

of certain commodities and making allocations thereof acted merely as a clearing house for such resources of the country as were so vital to the war requirements of the Government as to necessitate their control by some central authority in such manner as to enable contractors with the Government for manufactured articles to obtain their raw materials promptly and from sources so located as to minimize transportation.

It is true that the War Industries Board through its close relation to other governmental war agencies was, for practical purposes, in a position to enforce compliance with its allocations and other requests and that its notice to claimant that it had been selected to supply the American Car & Foundry Co. with the iron required by it had in reality the effect of compelling claimant to keep that amount of iron of the prescribed standard and quality on hand for sale to that company. Claimant probably could not, therefore, as a matter of fact, while the allocation remained in force, have carried through a sale to a third party of such a quantity of iron of the specified description as would have reduced its stock thereof below the requisite amount.

But it is very evident from the entire transaction that there was no expectation on claimant's part that the Government was to be in any way responsible for the payment for the iron or that it was to guarantee that the American Car & Foundry Co. would purchase it. It does not appear that the claimant ever attempted to have the allocation withdrawn, as it might well have done upon learning of the armistice and the probable diminution of the Government requirements for cars for use overseas. On the contrary, it endeavored for several weeks to induce the American Car & Foundry Co. to purchase the iron from it and in so far as appears, made no claim against the Government until months later, when it had become evident that the former did not need the iron and would not contract for it.

No act or statement by any person acting under the authority or direction of the Secretary of War or of the President has been established which furnishes a basis upon which this Board can grant claimant relief.

DECISION.

There was no agreement between the claimant and any officer or agent acting under the authority, direction, or instruction of the Secretary of War or of the President which the Secretary of War is authorized to adjust, pay, or discharge under section 1 of the act of March 2, 1919.

DISPOSITION.

This Board will enter a final order in the usual form, denying the relief prayed for.

Col. Delafield and Mr. Hunt concurring

**Cases Nos. 1215, 1622, 1623, and 1624 combined under
No. 1215.**

In re **CLAIM OF BIJUR MOTOR APPLIANCE CO.**

1. JURISDICTION, BOARD OF APPRAISERS—COMMANDING ORDERS.—

Where claimant voluntarily entered into an agreement with the Government to move its plant from one building to another because the Government desired the use of the former for another Government contractor, and claimant's building along with other buildings were afterwards commandeered by the Government, the jurisdiction of this Board, under the act of March 2, 1919, is not ousted by the jurisdiction of the board of appraisers under the commandeering order. The fact that claimant has presented claims to both boards makes no difference, since the awards may be coordinated to prevent duplication of payment of any item.

2. EXPENSES OF MOVING.—The agreement to pay moving expenses from Building "F" to Building "A" does not, by implication, include the expenses of moving back from Building "A" to Building "F" after the period of the emergency, especially when the Government's agent told claimant that he had no authority to commit the Government to such expenses.

3. CLAIM AND DECISION.—Claim under act of March 2, 1919, for \$411,300.75, based upon an oral agreement to pay claimant the expense of moving its plant and equipment from one building to another. Held, claimant is entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. These cases arise under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$411,300.75, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. Claim No. 1215 is for reimbursement of the expenses and incidental losses entailed in moving claimant's plant and equipment, at the request of the Government, from Building "F" to Building "A" of the Hoboken Land & Improvement Co., at Hoboken, N. J., and also for the expenses of fitting up Building "A" for the use of the claimant. The District Claims Board instructed claimant to divide

this claim into three parts, which claimant did by submitting claim No. 1624 for \$230,264.38 for expenses of moving from Building "F" to Building "A"; claim No. 1623 for cost of repairs, which cover facilities only; and claim No. 1622 for cost of such repairs to make Building "A" serviceable for the claimant's business. The single claim, No. 1215, includes all items embodied in claims Nos. 1622, 1623, and 1624. As the claimant relies upon a single agreement in support of its claims, and does not contend that there are three separate agreements, we have consolidated all four claims under claim No. 1215, and will render one decision covering the whole claim.

3. In January, 1918, the Small Arms Section of the Ordnance Department of the United States decided that it would be necessary to increase the facilities of the Remington Arms Co. at its Hoboken plant, Hoboken, N. J., in order to enable the production of small-arms ammunition to be maintained in accordance with the program of the Government. It was then determined that Lieut. Col. (then Maj.) Hayden Eames, Chief of the Small Arms Section, Production Division, Ordnance Department, should proceed to obtain possession for the Remington Arms Co. of a block of factory buildings in Hoboken owned by the Hoboken Land & Improvement Co., one unit of which was then leased by the Remington Arms Co.

4. This block of buildings, belonging to the Hoboken Land & Improvement Co., consisted of Buildings "D," "E," and "F," which comprised one unit 12 stories high, and Building "A," which was a separate detached building 200 feet distant from Building "F," which was the nearest of the group. Buildings "F," "E," "D," (and "C," if erected) would form an elongated "U," the base of which was farthest from Building "A." Building "F" was on the north side of the "U," 81 feet wide and extending 265 feet east to a point where it joined Building "E," which extended halfway around the base of the "U" to a point where it joined Building "D," which in turn extended around the other leg of the "U" to a point opposite the junction "F" and "E." Had Building "C" been erected, it would have completed the elongated "U," opposite Building "F."

Building "D" was equipped and occupied by the Remington Arms Co.; Building "E" by the Jewell Tea Co.; and Building "F," together with its power plant, by the Bijur Motor Lighting Co., which was then in the hands of receivers and later reorganized as the Bijur Motor Appliance Co., the claimant herein. Building "A" was occupied by 19 tenants.

5. After some preliminary negotiations Mr. Joseph Bijur and Mr. E. Bright Wilson, two of the three receivers of the Bijur Motor Lighting Co., and Mr. Perley H. Noyes, counsel for the receivers,

came to Washington on February 11, 1918, at the request of the Government, to have a conference with Lieut. Col. Hayden Eames. They were met by a Col. Alden, who had previously inspected the claimant's plant, and who took them to Lieut. Col. Eames. Col. Alden explained to Lieut. Col. Eames that the Bijur Co. was manufacturing starters for Liberty motors, which were to be used in tanks and airplanes, and that he wanted Lieut. Col. Eames to appreciate that the Bijur Co. was the only source of supply of these articles. It also appears that these facts were brought to the attention of Lieut. Col. Eames by Maj. Fred Glover, Chief of the Motor Equipment Section, Procurement Division, and Admiral R. S. Griffin, United States Navy, who requested that if the Bijur Co. was to be moved out of its plant it be moved with as little interruption to its production as possible, and that another suitable location be found for it.

At the conference on February 11 Lieut. Col. Eames told the claimant's representatives that the Government required that Building "F" be immediately placed at the disposition of the Remington Arms Co. The representatives of the Bijur Co. replied that they realized the urgent necessity of the Government to acquire Building "F" for the Remington Arms Co., but that the Bijur Co. was constructing parts for the Liberty motors and starters for tractors for the Government, and an interruption of business would practically destroy their company. Thereupon Lieut. Col. Eames stated that he wanted to avoid that, as he was convinced of the importance of the work being done by the Bijur Co., and that if the Bijur Co. would voluntarily move out of Building "F" the Government would provide other suitable quarters for it, and would reimburse it for all expenses and costs of moving, including losses arising from the interruption of business.

On the following day, February 12, the proposition previously submitted was accepted by the claimant's representatives, who stated to Lieut. Col. Eames that if the Government would secure Building "A" for the use of the Bijur Co. and pay its expenses of moving, it would move immediately. It was then agreed between Lieut. Col. Eames and Messrs. Bijur, Noyes, and Wilson on behalf of the claimant that the Bijur Co. would voluntarily move out of Building "F" and into Building "A," and the Government would pay all costs and expenses of moving, including losses occasioned thereby, so that the Bijur Co. would be made whole for the expenses and losses incident to moving.

Before the closing of the hearing which was had in this case, the counsel for the claimant argued that the reasonable intendment of the agreement made between claimant's representatives and the

Government was that an allowance should be made to the claimant for the cost of moving back from Building "A" to Building "F." Mr. E. Bright Wilson, one of the receivers, when a witness at the hearing of this case, was asked whether the receivers discussed with Lieut. Col. Eames the question of the expense of moving back after the war, testified that Lieut. Col. Eames did not make any agreement as to this, but stated he did not have authority to commit the Government to such an expense.

6. It was originally contemplated that the cost of moving the claimant's plant should be covered by the Remington Arms Co.'s cost-plus contracts, but this plan of payment was later abandoned.

It was not originally intended to use commandeering proceedings at all, but two things developed which made it necessary to resort to such proceedings in order to accomplish the desired results of obtaining buildings "E" and "F" for the Remington Arms Co. and building "A" for the Bijur Co. The two controlling reasons for instituting commandeering proceedings to acquire Buildings "A," "E," and "F," although the Bijur Co. had voluntarily agreed to abandon possession of Building "F," were (a) the naval appropriation act, under which commandeering proceedings were to be had, if at all, expired on March 1, 1918, and (b) the Jewell Tea Co., which occupied Building "E," and some of the 19 tenants which occupied Building "A" were unwilling voluntarily to relinquish possession of their buildings.

It was, therefore, essential to resort to commandeering proceedings at once, and so a commandeering order was issued on February 28 for all three buildings, which would not have been necessary had the Bijur Co. been the only concern involved, because it had entered into an agreement with Lieut. Col. Eames voluntarily to vacate Building "F,"; had cooperated with the Government in every way, and had actually begun to move its internal equipment before the commandeering order was issued.

7. It also appears that the following letters were sent claimant ordering it to move into Building "A" and to make the necessary repairs thereto for the proper equipment of that building:

HOBOKEN, N. J., *May 24, 1918.*

From: Inspector of ordnance, U. M. C., Hoboken Works.

To: Bijur Motor Lighting Co., its receivers and its successors.

Subject: Building "A."

1. You are hereby directed to move into Building "A" of the Hoboken Land & Improvement Company, Garden and 15th Streets, Hoboken, N. J.

(Signed)

WALTER HINMAN,
Capt., Ord. Dept., N. A.

BRIDGEPORT, CONN., *August 28, 1918.*

From: Inspector of ordnance (Major Walter Hinman), U. M. C.,
Bridgeport Works.

To: Bijur Motor Lighting Company, Hoboken, N. J.

1. At a conference yesterday afternoon with Lt. Col. John S. Dean it was decided that you should make necessary repairs to the property commandeered from the Hoboken Land & Improvement Company which has been turned over to your use.

WALTER HINMAN,
Major, Ordnance Dept., U. S. A., A. I. of O.

8. In compliance with the agreement of February 12 with Lieut. Col. Eames, and the written notices of May 24 and August 28, above set forth, the claimant company moved out of Building "F" and into Building "A," and fitted up Building "A" for the performance of its Government contracts. Each of the 12 floors of Building "F" contained machinery, apparatus, and equipment belonging to the Bijur Co., which aggregated 1,200 tons in weight. Claimant now presents its claim for reimbursement of the expenses of moving and expenses incident thereto, as well as for the expenses entailed in fitting up its plant in Building "A."

9. This claim was presented to the War Department board of appraisers before the passage of the act of March 2, 1919, because there was a commandeering order for the use and occupancy of Building "F" by the Government, in addition to the order from military authority herein quoted, dated May 24, 1918, directing the claimant to move from Building "F" to Building "A." However, the claimant requests and consents that in case of an award by both boards, such awards be compared and coordinated, so that there will be no duplication of payment of any item. (See Record, pp. 135, 136.)

DECISION.

1. The Government desired to obtain for the use of the Remington Arms Co. a building which the claimant company occupied and which was adjacent to and part of a large building in a part of which the Hoboken plant of the Remington Arms Co. was located. At the request of the Government the claimant's representatives agreed on February 12, 1918, to voluntarily relinquish possession of Building "F" upon the express agreement that the Government would pay all the costs and expenses of moving, including losses occasioned thereby, so that the Bijur Co. would be made whole for expenses and losses incident to moving. It was part of this agreement that the Government should obtain for the claimant company a building in the vicinity, known as Building "A," which was then occupied by 19 tenants.

In compliance with this oral agreement the Bijur Co., about the middle of February, began moving some of its equipment and cooperated with the Government in every way to comply with its wishes.

2. It was not originally intended to resort to commandeering proceedings at all, but, owing to the fact that the law under which commandeering proceedings could be had, if at all, would expire on March 1, 1918, and to the fact that the tenants of Building "A" and also the tenants of Building "E," which latter building the Government also required for the Remington Arms Co., were unwilling voluntarily to relinquish possession of Buildings "A" and "E," respectively, a commandeering order was issued on February 28 for Buildings "A," "E," and "F," which would not have been necessary had the Bijur Co. been the only concern involved.

Subsequently, the claimant was ordered to move into Building "A," which had been commandeered by the Government, and to make all necessary repairs thereto, so that it could continue to manufacture starters for Liberty motors and tractor generators, which it had been making for the Government.

3. In pursuance to the agreement entered into between the claimant's representatives and the Government on February 12 and the directions subsequently received from the Government, the claimant company moved its entire equipment, tools, and machinery, which weighed approximately 1,200 tons, out of Building "F" and installed them in Building "A." It was also required to make improvements in Building "A" for the proper conduct of its business, which it did make, and these improvements included the installing of a power plant to operate its machinery.

4. While it was necessary for the Government to resort to commandeering proceedings to obtain possession of Buildings "A" and "E," occupied by other concerns, it is difficult to understand why a commandeering order was issued to include Building "F," which the claimant company had agreed with the Government voluntarily to vacate, and in fact had actually begun to vacate by the middle of February. We are of the opinion that this commandeering order, in so far as it affects Building "F," which was formerly occupied by the Bijur Co., can not operate to divest the claimant of the rights it acquired through the act of March 2, 1919, to obtain reimbursement in accordance with its oral agreement with the Government made on February 12, 1918. The Board of Appraisers has jurisdiction to make allowances for certain items of damage which directly resulted from the commandeering order; nevertheless, this should not oust this Board of its jurisdiction to make settlement on a fair and equitable basis, so as to reimburse the claimant the losses which resulted from its voluntarily and completely carrying out its prior agreement with the Government, entered into on February 12, 1918.

The fact that the claimant presented a claim to the Board of Appraisers prior to the passage of the act of March 2, 1919, does

not alter the conclusion we have reached. In fact, the claimant has requested that in case an award is made by this Board and the Board of Appraisers such awards be compared and coordinated, so that there will be no duplication of payment of any item.

5. The Board is, therefore, of the opinion that on February 12 the claimant entered into an oral agreement with the Government whereby it should move its entire plant and equipment from Building "F" to Building "A" of the Hoboken Land & Improvement Co., Hoboken, N. J., and that the Government should reimburse the claimant the costs and expenses of moving, including incidental losses, and the costs and expenses of adequately fitting up its plant in Building "A." The claimant company voluntarily complied with said agreement, and is now entitled to reimbursement of expenses in carrying out said agreement. The Board, however, fails to find that any agreement was entered into which obligates the Government to pay for any expenses of moving back from Building "A" to Building "F."

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Ordnance Claims Board for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

2. Attention of the Ordnance Claims Board is invited to proceedings had before the War Department board of appraisers. If it be found that the board of appraisers has adjudicated any of the items herein claimed, such items should be compared and coordinated with the findings of this Board, so that there will be no duplication of payment.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 2342.

In re **CLAIM OF NASH MOTORS CO.**

1. **INSPECTION—MISSING PARTS.**—Where trucks were inspected and accepted at claimant's plant by a Government inspector, if certain parts were missing at destination it was through no fault of the claimant, and where, thereafter, claimant at the request of the Government replaced the missing parts, there was an agreement within the purview of the act of March 2, 1919, under which claimant is entitled to payment for those parts.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a written request to replace motor equipment lost through no fault of claimant. Held, claimant is entitled to relief.

Maj. O'Neill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$52.30, by reason of an agreement alleged to have been entered into between the claimant and the United States.
2. During the year 1918 the Nash Motors Co., of Kenosha, Wis., was furnishing, under a contract with the United States, automobile chassis for trucks, and, under the conditions of the contract, the chassis and equipment were to be inspected by the United States and accepted f. o. b. cars at claimant's factory, Kenosha, Wis.
3. The United States Government maintained an inspector at the plant of the claimant, whose duty it was to inspect and pass all chassis and equipment produced under said contract.
4. On or about the 6th day of March, 1918, 20 motor trucks having been inspected and accepted by the Government Inspector were shipped under Government bill of lading to camp ordnance officer, Camp Cody, Deming, N. Mex.
5. Upon the arrival of these trucks at destination certain items of equipment were found to be short, and on March 29, 1918 First Lieutenant M. Pulford, Ordnance Reserve Corps, acting Army Inspector of Ordnance, by letter, requested the claimant to prepare

duplicates of the missing parts for shipment, which was accordingly done, and on May 23, 1918 the same were shipped by express, under Government bill of lading, to camp ordnance officer at Camp Cody, Deming, N. Mex., and on the same date invoices were rendered to said officer for the said parts, in the amount claimed, viz, \$52.30. Prior to shipment, the parts were inspected and accepted by the inspector stationed at claimant's plant.

6. The trucks having been inspected and accepted at the plant of the claimant by the Government Inspector, if the parts were missing on their arrival at destination it was through no fault of the claimant company.

DECISION.

1. When the trucks were delivered by the claimant company, having been inspected, passed, and accepted by the Government Inspector, at the plant of the company at Kenosha, Wis., as complete and complying with the contract under which same were manufactured; and when thereafter Lieut. Pulford, in writing, requested the claimant to prepare and ship the missing parts, and when the parts were prepared and shipped in compliance with such instructions, a contract arose between the Government and the claimant, within the purview of the act of March 2, 1919, under which the claimant, Nash Motors Co., is entitled to the payment of this claim.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and certificate Form C to the Claims Board, Ordnance Department, for action in accordance with this decision.

Col. Delafield and Mr. Low concurring.

Case No. 1566.

In re CLAIM OF HARTFORD MACHINE SCREW CO.

1. **SUSPENSION—CANCELLATION FOR DEFAULT.**—Where under the terms of its contract claimant was in default in delivery, a notice from the Government to suspend operations would have constituted a waiver of the Government's right under the contract to rescind the contract, if the notice was sent with full knowledge of the facts. Since the contract was suspended without such knowledge, the suspension, being without prejudice to the rights of either party, does not now prevent the Government from canceling the contract for claimant's default.
2. **CLAIM AND DECISION.**—Claim presented under General Order 103 based upon a formal contract for bolts. Held, the contract should be canceled on account of claimant's default.

Mr. Montgomery writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Orders, No. 103, War Department, 1918 and is for \$398.02, under the following circumstances:

2. The claimant entered into a formal contract with Lieut. F. D. Schnacke, Air Service, Signal Reserve Corps, bearing date June 11, 1918. It is numbered 3940, and refers to purchase order No. 65756, dated May 23, 1918, for 45,000 bolts, at a price of \$2,920, "shipment to begin in 60 days; to be completed in 120 days."

3. The specifications did not designate the size of the bolt heads. Claimant wrote repeatedly for further specifications. These were not received until July 30, 1918. Claimant did not order its material until September 17 and 30. On December 31, 1918 it was directed by telegram to stop production.

4. The telegram was confirmed by letter dated January 3, 1919, signed by Capt. S. M. Wiley, Air Service, Aircraft Production, by direction of the Director of Aircraft Production, as follows:

"1. This letter confirms our telegram to you of December 30, 1918, reading as follows:

"Stop all production on order six five seven five six, covering bolts. Incur no further expense thereon. Acknowledge receipt."

"2. Owing to certain technical Government laws and regulations it would work hardship on a contractor if this office were to cancel this contract outright. You will, however, understand that the re-

quest that you stop production is intended virtually to effect cancellation except as to the quantities specified for production.

"3. In this connection you are advised that you should engage no new labor or replace labor without the prior approval of this office. All Sunday, night, and overtime labor should be discontinued. No new contracts should be made with suppliers or subcontractors without first obtaining the prior approval of this office.

"4. The Finance Division of this bureau will make an investigation as to the expenses incurred by you which are chargeable to this contract, and will furthermore endeavor to arrive at a tentative basis of settlement with your company subject to final approval by the Bureau of Aircraft Production in Washington."

5. The contract provides that if the contractor fails to perform within the time specified, the Government at its election—

"(a) May rescind the contract; (b) may supply the deficiency by purchase in the open market or otherwise, charging the said contractor with any loss occasioned by a difference between such purchase price and the original contract price; (c) may take over from the contractor any or all items completed or in process of manufacture, payment for which shall be the difference between the contract price and the cost to the United States of having the articles or equipment completed; (d) or may permit the party of the second part to complete delivery within a reasonable time after the date or dates specified herein, and in this event liquidated damages shall be deducted as provided in the attached order."

No liquidated damages are provided for in the order attached to the contract.

6. The Air Service Claims Board decided that the claim should be returned to the Contract Department with the recommendation that the order be canceled for default.

7. No hearing has been had before this Board.

DECISION.

1. The delay of the Government in furnishing the necessary specifications automatically extended the time for completion of deliveries. In the absence of any showing that the contractor could not complete the contract in 120 days from July 30 as well as in 120 days from May 23, 1918, the Government's delay extended the time for completion until 120 days after July 30, 1918.

2. The letter directing suspension indicated that the Government had intended to "permit the said contractor to complete delivery within a reasonable time" rather than rescind the contract. If sent with knowledge of all the facts it constituted a waiver of the Government's right to rescind. (See decision of this Board in re Taft-Pierce Manufacturing Co., No. 2375.)

3. It does not appear that the Government had until after this claim was filed any knowledge or notice of claimant's delay in order-

ing material. It is to be presumed that if the Government had known that the delay in completing the contract was due to claimant's delay in ordering material, the letter of January 3 would not have been sent, but instead the contract would have been rescinded for the claimant's default.

4. The contract is still pending, the suspension being without prejudice to the rights of either party. It should be rescinded in accordance with the recommendation of the Air Service Claims Board.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for appropriate action.

Col. Delafield and Lieut. Col. Junkin concurring.

Case No. 2248.

In re **CLAIM OF ANNISTON STEEL CO.**

- 1. PLANT EQUIPMENT—DEPRECIATION OF.**—Where claimant was possessed of a forging plant at the time it entered into an informal agreement with the Government for the manufacture of body forgings for shells, terminated by the Government after part performance because of the armistice, amortization in the value of such plant as the claimant had at the time it entered into the agreement is not an item of reimbursement which should be allowed.
- 2. APPEAL—QUESTIONS TO BE CONSIDERED.**—Where but one question is raised by an appeal, this Board is not authorized to consider alternative relief, suggested by claimant for the first time before this Board, but the denial of such alternative relief will not preclude it from presenting such claim to the proper claims board.
- 3. CLAIM AND DECISION.**—Appeal from Claims Board, Ordnance Department, from its decision denying claim for amortization of plant. Action of Claims Board affirmed.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board, Ordnance Department, confirming a decision of the Cincinnati District Ordnance Claims Board on a claim for \$155,222.34 on an informally executed contract, dated on its cover June 6, 1918, but in the body of the contract July 15, 1918, for the manufacture of 6,000 high-explosive shells for seacoast guns. The contract was signed "United States of America, by Samuel McRoberts, Col., Ord. Dept., National Army, Contracting Officer, by Wm. Williams, Lt. Col., Ord., N. A."

2. On November 23, 1918 claimant was sent a notice requesting it to suspend operations on its contract, and on November 27 the claimant replied agreeing to suspend operations. At this time the claimant had completed only three shells under its contract. The matter of settlement was taken up by the Cincinnati District Ordnance Claims Board, and negotiations were had with the claimant by the staff of that board. The result of these negotiations was entirely satisfactory to the claimant with the exception of one item of its claim, which was for the depreciation of its plant amounting to \$72,600, which it had stated on Finance Form 8, sheet 2, of its statement of claim. At the hearing before the Board of Contract Adjust-

ment on February 6, 1920, claimant's representative and vice president, Mr. W. H. Wells, admitted that the only question presented on this appeal was the question of the allowance of its claim for depreciation of its plant, or if the Board was not inclined to grant relief on that score then the claimant would like the Board to consider whether the claimant was not entitled to the rental value of its plant while the same was idle during the time that it was making preparations to perform the contract in question and also during the time required to rehabilitate the plant so as to restore it for commercial purposes. Mr. Wells admitted that these two claims are not consistent and he desired that the claim be considered in the second alternative only in the event of the Board's denying relief on the claim for depreciation of the plant.

3. On May 29, 1919 the Cincinnati District Ordnance Claims Board made a "revised award" to claimant on account of the suspension of its contract. The award contained the following items:

Direct labor and overhead expense.....	\$41,261.80
Commitments for materials or services.....	3,865.92
Claims for other compensation.....	37,494.62
Total	\$82,622.34

The following deductions were made:

Loan to contractor from Government.....	95,000.00
Scraps from worked materials, etc.....	5,287.08
Total	100,287.08
Balance due by contractor to the Government.....	17,664.74

4. It appears that the forging plant of the Anniston Steel Co., which is the plant in question, was acquired by it in 1914. Some time thereafter the Anniston Ordnance Co. entered into contracts with J. P. Morgan & Co. to produce finished shells for the British Government. The Anniston Ordnance Co. attempted to make finished shells under its contracts, but for some reason undisclosed by the record these contracts for shells for the British Government were terminated. The Anniston Steel Co., in 1915 and 1916, acquired hydraulic presses and installed a shell-forging plant for the purpose of producing shell forgings which were to be supplied to the Anniston Ordnance Co., but when the contracts of the Anniston Ordnance Co. were terminated the Anniston Steel Co. had no further use for its shell-forging plant and it remained practically idle until the contract involved in this claim was negotiated, except that early in 1918 it did have a small order to furnish propeller wrenches for the Emergency Fleet Corporation. According to Mr. Wells's testimony, all of the machinery and equipment in the shell-forging plant had been acquired by the claimant company prior to July 15 1918.

at a cost, including the installation thereof, of approximately \$75,000. It can in nowise be said that this machinery and equipment, on which depreciation is claimed, was purchased in contemplation of the contract involved in this claim, dated July 15, 1918.

5. On March 7, 1919, the staff report of the Cincinnati District Ordnance Claims Board was filed. This report was made the basis of the decision of the Cincinnati Board which is appealed from. Paragraphs 32-37 of said staff report are as follows:

"32. This finance form contains an amount of \$72,600 which the Anniston Steel Company are making for depreciation in their shell-forging plant and equipment. They derived this depreciation as a difference between what they set up as their value of the plant on July 15, 1918, and their valuation of their plant on December 3, 1918.

"33. Without checking the values which they have placed on their equipment in July and again in December and assuming them to be correct, the value which they set up as depreciation is, what might be termed, a "paper loss." In other words, assuming their values to be correct, it represents the loss which they assumed by not selling their plant in July, 1918. According to their statement, they could have sold the plant at that time, but they preferred to enter into a contract with Mr. Hellen so that they could fill the shell-forging contract themselves, as they figured in so doing they would make more money than if they sold their equipment to others. We see, therefore, no reason why the Government should pay them for any loss which they suffered owing to the fact that they did not choose to sell their plant in July.

"34. Again, depreciation is generally understood to mean the difference between the cost of the plant and its present value. In looking into their books regarding this feature, Mr. Edw. C. Allen, U. S. accountant, found the amounts which paid for most of the items of their equipment listed on sheet No. 2 of Finance Form No. 8. Attached is a copy of his report covering his findings in this regard.

"35. With the exception of four items, namely, a high-pressure water line, two pumps with one 20-horsepower motor, one water tank on tower with pump connection, and one 20-ton electric locomotive crane, the cost of the items enumerated by the Anniston Steel Company in their claim for depreciation was found by Mr. Allen to have been \$41,684.20, the purchases having mostly been made in October and November of 1916. Some, however, were made a month or two previous to that time.

"36. Without revaluing their plant at the present time, and again accepting their figure for the value of these items on December 3, 1918, we find that their valuation for the items included in Mr. Allen's report, amounts to \$40,550, being only \$1,134.20 less than actual cost over two years ago. When one takes into consideration the fact that the equipment was originally purchased for a British shell-forging contract, and that it lay idle for nearly two years after the cessation of that work, and was only in use in the production of propeller wrenches for a few weeks before they began reconstruction on account of the U. S. Government contract, and, further, in view of the fact that the U. S. Government proposes to allow the

Anniston Steel Company for labor and materials which they have expended in placing their shell-forging shop in better condition than it was previous to the U. S. Government contract, both from a shell-forging viewpoint, as well as from a commercial forging viewpoint, we see no reason why such an allowance should be made for depreciation. The amount which it is proposed to allow, which was expended in the rehabilitation and betterment of their plant, is \$41,931.90, which covers labor, materials, factory overhead, administration, general and operating expenses and construction account, and it would seem that this would very much more than offset the difference of \$1,134.20 referred to above.

"37. As a matter of fact, Mr. Wells, vice president and general manager of the Anniston Steel Company, admits that there is no deterioration in their plant, and that actually the plant is in better condition than it was before they took on the shell-forging contract. They feel, however, that they have a just claim for depreciation, based on appreciated values as described above. Not only is it proposed to allow them for expenditures made in the improvement of their plant, but it is further proposed to allow them \$10,000 for the reconstruction of their plant, to enable them to produce commercial forgings. We, therefore, scarcely see how they have any claim whatever for depreciation. The fact is that this plant was idle for nearly two years after the termination of their British contract. During that time, owing to the war conditions there was a good demand for such equipment, and they could have sold the same at practically any time during that period and at an advance over and above their actual cost. Furthermore, they might have secured some commercial work which could have been produced on this equipment. They did not, however, for reasons unknown to the writer, secure any such business until a very short time prior to the awarding of the present shell-forging contract by the U. S. Government. They were then producing a very small order of propeller wrenches. We wish, therefore, to repeat again that we feel that the Anniston Steel Company will be amply reimbursed if they are allowed the amounts which we are recommending for expenses made in the plant and for reconstruction. For the reasons given above, we have eliminated all charge for depreciation in our counterclaim."

6. At the hearing before the Board of Contract Adjustment the claimant contended, as it had done before the two lower boards, that it was entitled to estimate the value of its plant on July 15, 1918, the date when the contract in question was entered into, and to take therefrom the value of the plant on December 3, 1918, the date when the contract was suspended, thereby arriving at the figure which the Government should pay the claimant on account of depreciation of its plant. Mr. Wells testified that the plant, to the best of his knowledge had actually cost the claimant approximately \$75,000, whereas in its statement of claim the claimant values the plant, as of July 15, 1918, at \$128,600. Mr. Wells, however, admitted that the plant and its equipment for which depreciation charges are now claimed, were acquired a long time prior to his connection with

the claimant company, and, therefore, he was not able to verify his statement as to the actual cost.

According to Mr. Wells, the valuations placed on the plant on different dates are as follows:

Estimated cost in 1916.....	\$75,000
Estimated value on July 15, 1918.....	128,600
Estimated value on Dec. 3, 1918.....	56,000

By deducting the estimated value of December 3, 1918, from the estimated value as of July 15, 1918, we get the estimated depreciation, namely, \$72,600, which is the item involved in this claim.

7. Mr. Wells testified that in the spring of 1918 the claimant had a tentative offer to purchase the plant in question, made by Mr. C. W. Hellen, who, at the request of the Government, was finally put in charge of the plant by the claimant company after it had secured its contract with the Government. Mr. Wells testified, however, that the offer of Mr. Hellen to purchase the plant was only tentative and that the sale was never made, but the plant was retained by the claimant, as it expected to make large profits out of the contract for shells which it subsequently secured. It was Mr. Wells's insistence that the tentative offer to purchase the plant for \$150,000 in effect fixed the value of the plant at that amount, but that the estimated value of \$128,600 as the value of the plant as of July 15, 1918, is the basis of calculating the amount of depreciation.

DECISION.

1. The staff report of the Cincinnati District Ordnance Claims Board so fully and completely coincides with our views that we adopt the reasoning therein as expressing our conclusions. The claimant has been offered, and will receive under the proposed settlement, the cost, less salvage value, of the additional machinery and equipment installed in its plant by reason of the contract with the Government, including the cost of installation. In addition thereto the claimant will receive \$10,000 for reconstruction of the plant for commercial purposes. The result of reimbursing the claimant for these expenditures is that it now has a plant better equipped, more up to date, and more suitable for the manufacture of commercial products than it had when it entered into the contract with the Government. The claimant's estimated value of the plant as of July 15, 1918, was an inflated and fictitious valuation, due to the fact that there was a great demand for the articles which this plant could then manufacture. The depreciation it claims is a paper loss due to the cessation of hostilities and would have occurred even if claimant had had no contract with the Government. There has been no

ascertainable depreciation due to wear and use of the equipment in question because the claimant never got into production. We therefore conclude that the claimant is not entitled to any compensation on account of depreciation of its plant.

2. The claimant has requested that if this Board will not allow this claim for depreciation of its plant, which is the sole question presented on this appeal, then that its claim be allowed for loss of rental value of the plant. As the sole question presented before this Board at this time is the disallowance of the item for depreciation, this Board is not authorized to consider a different and contradictory claim for loss of rental of the plant. Had the claim for rental been filed with the Cincinnati District Ordnance Claims Board and it had been disallowed, and an appeal taken from that decision, the question would now be squarely before us. As the record stands, however, the question is not before us, although one of the Government witnesses did testify that the Cincinnati Board did include in an item of \$10,000 for rehabilitation, what it considered a fair allowance for the loss of rental. We do not, however, intend from what we have said that the claimant is precluded from taking such further action in regard to a claim for loss of rental value as it may deem advisable.

3. For the reasons stated the decision of the Claims Board, Ordnance Department, affirming the decision of the Cincinnati District Ordnance Claims Board, is affirmed, and the relief sought for is denied, but without prejudice to the right of the claimant to take such further action before the Cincinnati District Ordnance Claims Board in regard to a claim for rental of the plant as it may deem advisable.

Col. Delafield and Maj. Taylor concurring.

Case No. 2252.

In re CLAIM OF SOUTHARD CONTRACTING CO.

1. **EVIDENCE.**—Where the evidence offered in support of a claim is insufficient to show a contract, express or implied, the claimant is not entitled to relief by reason thereof, under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—This claim arises under the act of March 2, 1919, and is presented upon the theory that the Government by oral contract leased a certain steam engine from claimant and that because of such lease claimant sustained damages to the extent of \$180.72. Held, that the evidence is insufficient to establish the contract alleged and that claimant is not entitled to the relief sought.

Mr. Harding writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919 for \$180.72, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Claimant claims that on or about the 4th day of November, 1918, by an oral lease, it rented to the United States Government, through Maj. William Blanchard, Constructing Division, Quartermaster Corps, a 20-horsepower steam engine belonging to the Southard Contracting Co., for purposes in connection with the United States Picric Acid Plant at Brunswick, Ga., and that it was delivered to the United States on or about the 4th day of November, 1918. It nowhere appears on what date the engine was returned to the claimant.

The items entering into the claimant's claim are—

60 days rental of 20 horsepower engine, at \$2 per day	_____	\$120. 00
2 men, at \$8.33 per day, 2 days	_____	33. 32
2 men, at \$3.10 per day, 2 days	_____	12. 40
Special pulling-off tool,	_____	15. 00

180. 72

2. It nowhere appears in the record that any commitments were made or obligations incurred by the claimant on account of this alleged lease. It appears by the record that some individuals connected in some way with the Government service removed said engine from the place where it was located at the time the supposed lease

was entered into, to a short distance therefrom, but that the same was never used or in anywise interfered with by the Government of the United States, or any officer or agent thereof.

3. The Board of Contract Adjustment, by R. R. Farr, Judge Advocate, chief attorney, Group G, Trial Section, on December 16, 1919, wrote the claimant requesting from it certain information upon which it might base a judgment as to whether or not any contract of the kind named was entered into, and such items as might enter into it, if any; and again on January 15, 1920, addressed a letter by the same Major, Judge Advocate, calling attention to the letter of December 16, 1919, requesting the claimant to supply the Board with its sworn statement upon the subject of its claim, and stating the necessity of having such affidavit before the claim could be properly decided. And on January 21, 1920, the Board of Contract Adjustment, by the same Major, Judge Advocate, addressed a telegram to the claimant stating that unless its affidavit requested in previous letters be supplied immediately the claim would have to be disposed of without it. Under date of January 30, 1920, the Board of Contract Adjustment, for the attention of the same Major, Judge Advocate, received a letter from the claimant, stating that such request for affidavits as covered in previous letters seemed to claimant ridiculous. The claimant declined to comply with the request.

4. It nowhere appears in the record that the claim was presented prior to June 30, 1919, for payment or adjustment to any Government authority as required by the act of March 2, 1919.

DECISION.

1. No contract to be adjusted under the act of March 2, 1919, is evidenced by the above findings of fact, and this Board is without jurisdiction in the matter and the claim should be disallowed.

DISPOSITION.

The claim is disallowed.

Col. Delafield and Mr. Diggs concurring.

Case No. 1782.

In re **CLAIM OF THOMAS GRAHAM & CO.**

- 1. CLAIM AND DECISION.**—Claim under act of March 2, 1919, for damages on account of failure to award contract to claimant. Held, no agreement within the meaning of act of March 2, 1919.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Ordnance Department Claims Board on a claim for \$10,115.70 under an alleged agreement made with Capt. Robert H. Fulton, representing the Government, on or about August 17, 1918.

2. On February 7, 1920, the date set for the hearing, the claimant did not appear. His attorneys, Ansell & Bailey, were telephoned. They requested five days' time within which to advise this Board whether they desired an adjourned hearing to take the testimony of the claimant's witnesses. Five days have expired and no request for an adjourned hearing has been made.

3. On June 3, 1918, purchase order No. 10302 was issued by the commanding officer of the Rock Island Arsenal to the claimant for 20,000 pieces of bent white oak rims for artillery wheels, at \$2.50 each.

4. On July 25, 1918, the claimant's secretary, J. G. Ross, wrote the commander of the Rock Island Arsenal that at a meeting of rim manufacturers in Chicago, held on July 24, 1918, an announcement was made by Lieut. Bassett, representing the Government, that the price for rims had been increased to \$3 per piece. Mr. Ross requested the same advance on the order for 20,000 rims. To this letter a reply was sent the claimant on July 31, 1918, announcing that the price could not be increased; that the claimant had an opportunity early to buy raw materials before the advance in price.

5. Mr. Fulton testified (pp. 44 and 45):

"Mr. Ross, when he came to the arsenal, stated that he was losing money at the contract price of \$2.50 each for the pieces and that he could not go into the market and get raw materials to complete the order without losing money. He wanted us to raise the price from \$2.50 to \$3, but I told him that he had accepted the order and, as a matter of fact, had already delivered 1,000 pieces on it, and that I

did not have, nor anyone at the arsenal, the authority to allow an increase in price. However, after talking it over, I agreed with him that the arsenal would cancel from the original order the amount for which he did not have raw material. At that date, the date of the conversation, Mr. Ross did not know the exact inventories of his raw material, but agreed to furnish it later, which he did, and from his own letter we figured that he had raw material in his shop or in transit which would make about 4,000 cut segments, counting in a bending loss of 25 per cent. These 4,000, together with the 1,000 which he had already delivered, make up the 5,000 at which we let the order stand.

"Question. Did he, in this conversation of August 17, 1918, say whether or not he would like you to cancel a part of this order for 20,000 over and above what he could make from the raw materials on hand, provided you could not give them the price of \$3?

"He agreed to that orally at that date."

6. On August 23, 1918, Capt. R. H. Fulton wrote the claimant as follows:

"Receipt is acknowledged of your letter of August 20, 1918, in reference to purchase order 10802, covering 20,000 pieces of bent fellow segments for 56" artillery wheels.

"In your second paragraph we understand that you have on hand 4,554 strips for making the artillery rims, three cars in your yards to be graded, one car of lumber to be sawed and graded, one car lumber in transit and two cars of strip in transit, and that you estimate the manufacturing loss at 25 per cent.

"We are unable to figure exactly how many rims you have in your possession, inasmuch as you do not give the number of rims in your cars. However, we figure that we should be able to obtain at least 4,000 good rims from the stock of rims which you have on hand. You have already delivered a little over 1,000 rims, which have been inspected and accepted. These 1,000 which you have delivered, together with the 4,000 which you are now bending for us, make 5,000 bent fellow segments which, we understand, you are now in a position to furnish.

"Accordingly we are reducing our purchase order from 20,000 pieces to 5,000 pieces. It is our understanding that you will bend and ship these remaining 4,000 pieces as quickly as possible, making special effort to complete this quantity within the next 30 days. Of course, if you find on bending that you have overestimated your manufacturing loss and turn out over 4,000 good segments, it will entirely satisfy us, and we shall expect you to ship them.

"In reference to the 15,000 pieces which we are hereby canceling, please be informed that as soon as you complete these 5,000 pieces on purchase order No. 10302, which it now calls for, we hope that you will again take it up with us and state what further requirements you may be in a position to furnish.

"We believe that this arrangement is entirely satisfactory to you and meets your desire, as outlined by your Mr. J. G. Ross in his conversation with Capt. Fulton, of this arsenal, on August 17. We hope that you understand that the arsenal wishes you by all means to continue your efforts in bending these segments for artil-

lery wheels and wish to assure you that we appreciate what you have done so far. It is hoped, therefore, that if you are in position to get any further rim stock in your shop you will at once notify this arsenal, in order that we may place some of our requirements with you, if possible."

On August 27, 1918, the claimant replied to the letter of the 23d in part as follows:

"We have your favor of the 23d instant, relative to your order for bent artillery rims and note you have reduced this order to 5,000 pieces and with the approximate amount of 1,000 already being delivered are expecting some 4,000 additional or as many as we have on hand and coming to us all of which will, of course, vary according to the grade of same and the loss in manufacture. We are now working on this material and making some additional improvements which will greatly facilitate our work and will do all in our power to complete this quantity in the time stated, 30 days.

* * * * *

"We are willing to accept your order for the 15,000 pieces at the present price of \$3 a piece and will do our utmost to complete same in addition to the order we now have before the first of the year.

* * * * *

"The matter of our getting in additional strips on this order is now at a standstill and we will be unable to start strips coming into us until we have received your letter advising disposition of the 15,000 additional pieces you are wanting."

7. On October 10, 1918, Capt. Fulton wrote the claimant asking if the claimant desired to bid on an order in addition to the 5,000 on which it was working. On October 16, 1918, the claimant replied that it had completed the previous order for 5,000 pieces and was in a position to take care of another order for 5,000 pieces and stated:

"We should have \$3.50 for these pieces delivered at the Arsenal."

On October 25, 1918, Capt. R. H. Fulton wrote the claimant:

"Confirming our telephone conversation of this morning we wish to advise you that we will not be able to place with you an additional order for bent fellow segments for 56" artillery wheel. This is due in part to the fact that you wish us to pay \$3.50 for these pieces. This arsenal can not pay this price."

On October 28, 1918, the claimant wrote Capt. Fulton that the sum of \$3.50 mentioned in its letter of October 16, 1918, was in error and that it should have read \$3 each. On November 4, 1918, Capt. Fulton in answer to the claimant's letter of October 28, 1918, stated that orders for all the rims required by the Rock Island Arsenal had been placed.

8. The claimant states in its letter of December 20, 1918, that it purchased additional stock because it was led to believe that the

Government would take more. It now claims it has a quantity of stock on hand which can not be disposed of except at the loss claimed of \$10,115.70.

DECISION.

1. The original order No. 10302 given the claimant for 20,000 pieces was reduced at claimant's request to 5,000 pieces, which were delivered to the Rock Island Arsenal. The claimant was paid therefor. No other agreement was made with claimant.

2. The claimant's bid in its letter of October 16, 1918 for 5,000 additional pieces at \$3.50 each, which bid was rejected.

3. The decision of the Ordnance Department Claims Board is sustained.

Col. Delafield and Mr. Fowler concurring.

Case No. 1643.

In re CLAIM OF THE DETROIT CHEMICAL WORKS.

1. **FACILITIES, AGREEMENT TO PAY AMORTIZATION ON.**—Where an authorized agent of the Government agrees with the manufacturer that if it will install special equipment for the manufacture of certain products that a Government contract will be given it, and that the Government will reimburse its unabsorbed amortization of the cost of the special equipment, in the event war is terminated before the cost has been properly amortized, there is an agreement within the meaning of the act of March 2, 1919.
2. **INFORMAL AGREEMENT TO TAKE ENTIRE OUTPUT.**—Where a duly authorized agent of the Government agrees that the Government will purchase all the materials the manufacturer is able to produce for an indefinite period during the war, and a quantity of material manufactured is delivered, and a quantity which has been manufactured is not delivered, on account of the Armistice, there is an agreement within the meaning of the act of March 2, 1919.
3. **PROCUREMENT ORDERS.**—Where a procurement information card, which in Ordnance Department practice precedes the procurement order, but no procurement order was issued, and articles are manufactured and delivered to the Government, and accepted by it, the Ordnance Department has no authority to issue a Form C certificate, as claim is Class B.
4. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for mixed acid and for special facilities. Held, claimant entitled to recover.

Mr. Smith writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. The claim comes before this Board as Class B for finished materials and raw materials on hand, and increased facilities installed in connection with the conversion of claimant's plant from a nitric acid to a mixed acid producing plant.
2. This claim comes to the Board under rather unusual circumstances. It seems that on or about July 12, 1918, the claimant then working under a formal contract for the production of nitric acid, was called up by long-distance telephone by Lieut. Albert B. Baker, a procurement officer of the Ordnance Department, stationed at Washington, and advised of the desire of the Ordnance Department to have produced at claimant's plant a quantity of mixed acid instead of nitric acid. It was understood during this conversation, that increased and additional facilities would be required and claimant inquired as to the size contract which would be awarded in order to learn whether or not it would be of sufficient size to amortize the

increased facilities necessary to perform it. Claimant was assured by Lieut. Baker that, while a contract could not be awarded covering a period except to the end of the war, claimant would be held harmless in installing these facilities.

3. Immediately after this conversation with Lieut. Baker, claimant changed his plant over for the production of such quantities as could be produced with available facilities, and at the same time commenced the installation of the increased facilities. Owing to the intervention of the armistice, however, such increased facilities were never brought into production, nor was a formal contract ever put through.

4. At the time operations were stopped on this contract, claimant had delivered to and the United States had accepted 161.2 tons of mixed acid and claimant had on hand a quantity of finished acid which had not been inspected or accepted, and also a quantity of raw materials.

5. The Ordnance Claims Board has issued a Certificate Form C, to which was attached the claimant's entire claim, and a partial award, Form 2, under such certificate has been issued by the district board to claimant, covering 161.2 tons of finished product delivered to and accepted by the United States and the amount of which award claimant has already been paid.

6. There is attached to the file a final award, prepared by the Ordnance District Board, covering the balance of the finished product, the cost of raw materials, and of the increased facilities. This final award was drawn up under the original Certificate Form C and sent in to the Bureau Board for approval. The Bureau Board refused its approval upon the ground that its intention in originally issuing the Certificate Form C was to cover only the delivered materials, i. e., 161.2 tons of finished product. That Board, therefore, forwards to this Board so much of the claim as is covered by this final award, stating that it is Class B in its nature and that the Board of Contract Adjustment has exclusive jurisdiction to pass upon it.

7. The only written evidence upon which the Ordnance Department originally issued its Certificate Form C appears to be a copy of a procurement information card, which it is understood in Ordnance Department practice precedes the procurement order, but the record indicates that the procurement order itself was never issued.

DECISION.

1. The conversation between Lieut. Baker and the claimant established an agreement whereby claimant was to furnish and the United States was to accept all the mixed acid which claimant was able to produce for an indefinite period not to extend beyond the duration

of the war, and that if claimant installed certain increased facilities in his plant, the United States would reimburse its unabsorbed amortization of the cost thereof in the event of the termination of the war before the cost had been completely amortized. This may all be considered, therefore, to be one informal agreement, and the claim thereunder Class B in its nature, so it would appear that the Ordnance Department exceeded its jurisdiction in issuing a Certificate Form C to cover any part thereof.

2. The Certificate Form C issued by the Ordnance Department, therefore, should be recalled and this Board will issue a new Certificate Form C based upon a document to be formulated by this Board, which will set forth the nature, terms, and conditions of the entire agreement and which certificate may be considered as confirming the partial payment award and payment thereunder already made to the claimant, and the Ordnance Department may then issue a final award to the claimant covering the balance of his claim under the informal contract.

3. The claimant, at his hearing before this Board, substantiated by proof the claim made for the acid and raw materials on hand, and for the increased facilities in the amount set forth in the proposed final award to which reference has been made.

DISPOSITION.

1. This Board will cause Certificate Form C to be issued, based upon a document formulated by this Board, covering the informal agreement entered into between the claimant and the United States and transmit same to the Ordnance Department, in order that the final award may be issued and the claim settled in the manner provided in this decision and the supply circulars of the Purchase, Storage and Traffic Division applicable thereto.

Col. Delafield and Mr. Hunt concurring.

Case No. 1931.

In re CLAIM OF W. H. WALKER & O. H. P. JOHNSON.

1. **LEASE, AUTHORITY TO CONTRACT FOR.**—Where claimants negotiated with officers of the Air Service for the lease of a building, to be constructed by claimants in the city of Washington to be occupied as offices for the Air Service, but understood that such officers had no authority to execute a lease, and are urged by the officers to begin construction and to take a chance on the lease being executed, there is no agreement within the meaning of the act of March 2, 1919.
2. **SAME.**—Where, under the circumstances stated, claimants complied with the request of the Air Service officers and began the construction of the building, and afterwards are notified by such officers to stop such construction, as the Government would not enter into the lease, claimants are not entitled to reimbursement of the expenses incurred.
3. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for building expense incurred in anticipation of a lease. Held, no contract within the meaning of the act of March 2, 1919.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, by reason of an agreement alleged to have been entered into between claimant and an officer or agent acting under the authority of the Secretary of War.

The claim is for expenses incurred in preparing to erect an extension to a building owned by claimants for use as an office by the Aviation Section of the Signal Corps.

A hearing of the claim was held February 3, 1920.

STATEMENT OF FACTS.

1. Claimants are tenants in common of an office building at 119 D Street NE., Washington, D. C., which in 1917 was occupied by the Aviation Section of the Signal Corps.

2. During 1917 claimants had some negotiations with the Signal Corps regarding the erection by claimants of an extension to this building to be used as additional office space by the Aviation Section.

3. Finally, about November 1, 1917, claimants had an interview with Lieut. Col. L. S. Horner, executive officer to Col. E. A. Deeds, Chief of the Aviation Section of the Signal Corps. At this interview Lieut. Col. Horner told claimants that the Aviation Section was in great need of additional office space without loss of time, and asked them if they would build this addition to the building already oc-

cupied. Claimants expressed their willingness to do so, provided the Signal Corps would rent the extension from them when built, on certain specified terms, and Col. Horner requested them to proceed at once with the building without waiting for the approval or execution of the lease by the proper superior officers, in reliance on Col. Horner's professions of ability to secure this approval. After some hesitation, claimants yielded to Col. Horner's solicitations and consented to do so.

4. The actual state of mind of the parties at this interview is best described in their own testimony. Col. Horner testified:

"I represented to Walker & Johnson that the exigencies of the War Department required them to take on faith from me the fact that a recommendation would be made to the War Department, through proper channels, for the necessary lease of an additional building which we wished them to put up. Walker & Johnson, I will say candidly, were exceedingly loath to enter into any kind of an oral agreement before a lease had been actually signed, because, they stated, they knew the risk and dangers of so doing, knowing Government procedure.

"I, therefore, unqualifiedly, the same as I would in my own business, urged Walker & Johnson to put up the addition, and take a chance on whether or not they ever got paid for it." (Testimony, pp. 31 to 32.)

Mr. Walker testified:

"On the occasion of this meeting, arranged at Colonel Horner's request, he told us that his superior officers, I think mentioning General Squier or the head of the Signal Corps, had approved the proposition, so that the formal agreement would be entered into by the Secretary of War; that it was perfectly authorized, and asked, in view of this fact, that we immediately start work. Mr. Johnson objected that this was a bit informal and risky. Colonel Horner asked that we, as a patriotic duty, waive the informality and immediately start work. I proposed to Mr. Johnson that we do so; that I was willing to do it if he was. Mr. Johnson consented. Colonel Horner then thanked us both and we immediately telephoned the contractor and work was started the next morning" (p. 7).

5. Claimants started work in good faith in the belief, induced by Col. Horner's representations that he was justified in his faith in his own ability to have the lease approved, and believing that they had made an agreement for a lease and that the approval and execution of the actual document was a mere formality that would follow in due course. It does not appear that claimants had any subsequent dealings with other officers or took any steps to verify Col. Horner's representations as to his authority or influence, but rather that they relied entirely on what he said. Col. Horner seems also to have acted in entire good faith and to have been actuated solely by a desire to secure the office space as soon as possible, but he does

not admit that he made any representations as to his authority and denies that he said anything amounting to instructions or orders.

6. Subsequently Col. Horner requested the Legal Department of the Signal Corps to prepare a lease embodying the terms agreed on by him with claimants. This was done, and the document was forwarded in regular course to the Secretary of War for approval. It was submitted by him to the Judge Advocate General, who reported to Col. Horner that the lease could not legally be made. Col. Horner thereupon told the claimants that "he did not believe he would be able to enter into the contract," and later, about January 1, 1918, told them to stop work, "as it was a lost hope to get the contract consummated."

DECISION.

1. The evidence in this case shows that neither Col. Horner nor his superior officers in the Signal Corps had any authority to make any such agreement as claimants alleged; that these officers knew this, and are on record to this effect; that whatsoever these officers did in respect to this project was subject to the approval of the Secretary of War, whose approval was in fact refused when the proposition was submitted to him. That although claimants did not know the limits of Col. Horner's authority, nevertheless they did know that he could not execute the lease itself; that the execution of the lease was the real inducement to claimants to make any agreement with Col. Horner at all, and that they were told by Col. Horner at the time of their dealings with him that in proceeding to work without the approval of the lease they were taking chances and were relying solely on Col. Horner's opinion that he could persuade the properly authorized officials to validate what he did. The evidence shows also that there was no previous practice or custom in the department that would have justified claimants in considering Col. Horner's actions as binding on the Government, even in the absence of official authorization.

2. In view of the foregoing, it sufficiently appears that claimants were put on their guard as to the risk they were taking in proceeding on Col. Horner's request without awaiting the approval of his superior officers, and that they calculated the chances and did what they did in reliance on their own judgment. There is, therefore, not sufficient evidence of any agreement between the claimants and an officer or agent acting under the authority of the Secretary of War within the meaning of the act of March 2, 1919.

DISPOSITION.

1. The claim should be denied.

Col. Delafield and Maj. Hope concurring.

Case No. 741.

In re CLAIM OF FRED T. LEY & CO. (INC.).

1. **INSURANCE, PUBLIC LIABILITY—BUILDING CONTRACTS—CONSTRUCTING QUARTERMASTER, AUTHORITY OF.**—Where a contractor is advised that a contract will be given it and immediately begins work at the request of the Government and takes out public liability insurance, with the approval and under the direction of the constructing quartermaster at the camp where the buildings are to be constructed upon the understanding that he is to be reimbursed therefor, there is an agreement to reimburse the contractor for the expense thereof, within the meaning of the act of March 2, 1919.
2. **SAME.**—If, after a contractor has taken out public liability insurance, with the approval and under direction of the constructing quartermaster, and before the formal contract is executed, it receives a letter from the officer in charge of cantonment construction notifying it that the Government would carry its own public liability risk, and the formal contract provides that such insurance as the contracting officer may require or approve shall be included as part of the cost of construction, and the contracting officer does not approve or require such insurance, the contractor, if the insurance is subject to cancellation, is only entitled to reimbursement of the cost thereof from the date of the policies up to and including the date of the letter, including the expense of cancelling the policies at short rates.
3. **CLAIM AND DECISION.**—Claim for cost of public liability insurance under the act of March 2, 1919. Held, claimant entitled to a partial adjustment.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Accounting Section of the Construction Division on a claim for payment of certain items amounting to \$10,190.15 on a formally executed contract as hereinafter appears.

2. The case was heard on January 15, 1920, and the claimant was represented at the hearing.

3. Under date of June 11, 1917, the claimant entered into a contract with the Government for the construction at Ayer, Mass., of—
“buildings and other utilities, except roads, stoves, bunks; mattresses, ranges, and refrigerators, for an Infantry division,”

including certain additional units.

4. The cantonment was named Camp Devens. It contained about 10,000 acres. The contract included something over 1,500 buildings, and as many as 9,000 men were at times working on the job. The total expense involved amounted to about \$10,000,000.

5. The contractor was notified on June 11 that a contract would be given it, and the contract was received and executed about three weeks later.

6. Upon being notified that it would receive a contract, the contractor immediately started work.

7. Maj. Edward Canfield, jr., was the constructing quartermaster at the location at that time; and later, on August 16, 1917, was appointed representative of the contracting officer, and as such had immediate control and supervision of the construction of the cantonment.

8. As soon as the work started the claimant's insurance manager and Maj. Canfield had a conference relative to the kind of insurance that should be taken out by the claimant, and, with the approval and under the direction of Maj. Canfield, the claimant took out various kinds of insurance, including public liability insurance. The policies on this insurance ran from month to month, the first being dated June 19, 1917.

9. On Jun 23, 1917 a letter was sent to the claimant from the officer in charge of cantonment construction at Washington, one clause of which was as follows:

"You are to carry such insurance as the contracting officer may direct and the needs of the case will require. * * * The foregoing points are based upon the assumption that the Government will carry its own risk against fire, public liability, and plate-glass damage."

10. The formal written contract was not sent to the claimant until June 29, upon which date it was executed by the claimant. The clause relating to insurance was as follows:

"ARTICLE II. Cost of the work. The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer, and as are included in the following items:

"*Item II.*—Such bonds, fire, liability, and other insurance as the contracting officer may approve or require."

11. On July 2 the contracting officer wired the claimant as follows:

"You will at once obtain insurance protecting your material against fire during time between delivery by carrier and acceptance by Government. Also such workmen's compensation insurance as required by statutes. Other insurance risks assumed by Government."

12. On July 7, 1917, Maj. Canfield wrote to the claimant as follows:

"Referring to your letter of July 5th, enclosing copy of telegram from Major Dempsey on the subject of insurance. This telegram raises two questions in my mind, one being that asked by you as to covering the timekeepers, paymaster bonds, robbery, office holdup, etc.; the other is that apparently Major Dempsey understands that he is to approve all insurance, and such approval is, therefore, not to be given by me. I think, therefore, that it is better to wait for the detailed instructions, which his telegram indicates have been mailed. Pending the receipt of this, insurance already approved by me will remain in force.

"E. CANFIELD, Jr.,
"Constructing Quartermaster."

13. On July 11, 1917, Maj. Canfield wrote the claimant as follows:

"I am enclosing a copy of a letter received from Col. Littell's office on the subject of insurance. You will note that the Washington office directs that your insurance shall be approved by them and not by me. I would therefore suggest that you terminate the policy with the Massachusetts Employees' Insurance Association and submit to the Washington office, direct, your policies for insurance in the stock company."

14. There was some further correspondence, and the claimant submitted liability policies, reimbursement of the expense of which it is now claiming. The policies were returned August 13, 1917, disapproved, and have never been approved by the contracting officer or his representative.

15. It was in evidence that policies such as those which form the basis of the present claim may be cancelled on 10 days' notice at short rates; that is, on payment of a somewhat higher premium than the premium at long rates.

DECISION.

1. On the date of the original conversation relating to the above policies, between the claimant and Maj. Canfield, the claimant had not received a copy of the contract and was not advised as to its terms so far as they related to insurance.

2. On June 23 the claimant received a letter from the officer in charge of cantonment construction at Washington, advising the claimant that it was to carry such insurance as the contracting officer might direct, and that the Government would carry its own risk as to public liability insurance. After this date the contractor must be taken to have had full knowledge of the Government requirements relative to insurance. If it chose thereafter to carry public liability insurance it would do so knowing that it could not be reimbursed for the expense unless its act in carrying such insurance was approved by the contracting officer. This approval was never obtained.

3. When the insurance was originally taken out the contractor was not advised of the Government requirements. We think it was justified in dealing with Maj. Canfield as the constructing quartermaster.

4. The claimant is entitled to the cost of public liability insurance from the date the policies were taken out up to and including June 23, 1917, and not thereafter, including the expense of cancelling at short rates.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, Washington, D. C., for appropriate action.

Col. Delafield and Lieut. Col. Carruth concurring.

Cases Nos. 2329, 2330, 486, and 487.

In re CLAIM OF THE KAHLER CO.

1. **DIRECTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.**—Where after formal orders for articles at fixed prices, not deemed sufficient by the contractor, are issued, but not accepted and thereafter the contractor and a duly authorized representative of the Government agree that the prices fixed in the orders will be increased 10 per cent and the contractor is instructed to proceed, without waiting for formal contracts or amended written orders, and does so, and has partially completed the contracts, when further production is ordered stopped by the Government, there is an agreement within the meaning of the act of March 2, 1919, which the Secretary of War is authorized to adjust.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for damages arising from the cancellation of orders for stitching horses. Held, agreement under act of March 2, 1919, and claimant is entitled to reimbursement.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. These four cases arise under the act of March 2, 1919. Statement of claim, Form B, has been filed in each case under Purchase, Storage and Traffic Division Supply Circular No. 17, for amounts hereinafter stated, by reason of agreements alleged to have been entered into between the claimant and the United States.

2. Orders of the Government were duly given prior to the armistice through the office of the Director of Purchase to the claimant, as follows:

Contract HC580J, for 1,400 stitching horses.
Contract HO967J, for 500 stitching horses.
Contract HO815J, for 50 stitching horses.
G. S. O. 3174J, for 600 stitching jaws.

3. The prices fixed in these orders were not deemed sufficient by the claimant and on claimant's demand for an increase of 10 per cent in all the prices, the United States, by oral order of D. W. Jasper, who was buyer and section chief in the office of the Director of Purchase, General Supply Branch, Supply Division, of the War Department, given over the telephone on November 1, 1918, expressly granted the increase of 10 per cent on all the prices demanded by the claimant, and the claimant was instructed by Mr. Jasper to go

ahead with the work and told that contracts would be mailed to him. Contracts covering all the orders at the increased prices were put in process of preparation and eventually reached the claimant after the armistice.

4. Prior to November 12, 1918, claimant incurred obligations and made expenditures for materials and supplies for the purpose of filling said orders, and partially manufactured the articles called for by the orders, before claimant was instructed to cease work on the orders, about December 1, 1918.

5. The Zone Supply Board at Jeffersonville, Ind., made the following proposed cancellation awards under Supply Circular No. 111:

Contract HC580J, for 1,400 stitching horses-----	\$2, 551. 00
Contract HO167J, for 500 stitching horses-----	910. 00
Contract HO815J, for 50 stitching horses-----	91. 00
Contract G. S. O. 3174, for 600 stitching jaws-----	160. 88
	<hr/>
	3, 712.88

6. The claimant also seeks a substantial sum for storage of this material since December 1, 1918, but was denied same by the Zone Supply Board, and from such denial appealed to the Claims Board, Office of Director of Purchase, who disallowed the entire claim. From this decision, the claimant appeals to this Board. At the hearing before this Board on January 27, 1920, the claimant formally abandoned its claim for storage charges.

DECISION.

The findings disclose, in the opinion of the Board, a valid agreement, consummated prior to November 12, 1918, between the claimant and the Government which was suspended by the Government before completion, and which the Secretary of War is authorized to adjust, pay, or discharge upon a fair and equitable basis. Under such agreement the claimant has sustained damages for expenditures made or obligations incurred upon the faith thereof, and is entitled to be reimbursed therefor. The claim for storage charges is denied.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Office of Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division, General Staff.

Col. Delafield and Mr. Bryant concurring.

Case No. 554.

In re CLAIM OF WEST LAFAYETTE MANUFACTURING CO.

1. **INTEREST.**—Under section 1901, Revised Statutes, no interest is payable on any claim against the United States “up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.”
2. **STORAGE—RESTRICTIONS UPON REGULAR OPERATIONS.**—A claim for storage is without merit where goods manufactured by claimant were not required to be kept by claimant an unreasonable length of time. Other claims based upon alleged delay in covering the goods, including a claim for reduced production claimed to be due to restrictions thereby placed upon regular operations, are equally without merit.
3. **RELEASE.**—A contractor who has been fully paid under a supplemental settlement contract containing a release is not entitled to payment for the above-mentioned additional items.
4. **CLAIM AND DECISION.**—Claim based upon a formal contract for drinking cups and hand basins, erroneously filed under the act of March 2, 1919, but properly considered under General Order 103. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is erroneously filed as a Class B claim under the act of March 2, 1919, but as it is based upon the execution of the terms of a formal contract, it is properly under General Order 103, War Department, 1918, and is for the sum of \$4,384.69 under the following circumstances:

2. On July 22, 1918, the claimant herein, West Lafayette Manufacturing Co., of West Lafayette, Ohio, entered into a formal contract, No. 3845, with the United States Government, through Colonel F. M. Hartsock, Medical Corps, United States Army, who was the contracting officer, for the furnishing and delivering of 562,500 white enamel drinking cups at 13 $\frac{3}{4}$ cents each and 50,000 white enamel hand basins at 22 $\frac{1}{2}$ cents each. The contract was approved by Captain J. J. Van Putten, Jr., Sanitary Corps, for the Surgeon General of the Army, on August 28, 1918.

3. On January 6, 1919 the contractor had delivered 345,168 drinking cups and 26,200 hand basins, and on that date entered into a cancellation agreement with Colonel F. M. Hartsock, Medical Corps.

4. Under the terms of the settlement agreement the Government agreed to pay the contractor certain sums of money, which payments were made as follows:

Check 63550, March 4, 1919. 10,000 hand basins.....	\$2,250. 00
Check 87571, April 30, 1919. 120,000 cups and 8,600 basins.....	19,291. 67
Check 87674, May 5, 1919. Amount allowed for suspending contract....	1,403. 80

5. Section 5 of the settlement contract provides as follows:

"5. The contractor does hereby, for itself, its successors, and assigns, remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum or sums of money, accounts, reckonings, claims, and demands whatsoever due or to become due in law or in equity under or by reason of or arising out of said original contract, except the sum or sums herein agreed to be paid. Upon receipt of said sum or sums the contractor shall execute and deliver to the United States further or additional instruments of receipt or release, as the United States shall demand."

6. And section 6 of said settlement contract provides:

"6. This agreement shall not become a valid and binding obligation of the United States unless and *until the approval of the Board of Review of Director of Purchase, Medical and Hospital Division, has been noted at the end of this agreement and upon Schedule 'A' thereof.*"

7. The settlement contract was approved by the Director of Purchase, Captain J. J. Van Putten, Jr., Sanitary Corps, on March 3, 1919.

8. On April 3, 1919, the contractor was furnished with shipping instructions, and on April 8 and 9 the goods were shipped from the contractor's plant, as per these shipping instructions.

9. The claim herein is based upon three items, as follows:

1. Interest on \$21,541.67 (the value of the 18,600 basins and 127,000 cups to be delivered to the Government) at 6 per cent, from January 7, 1919, to March 4, 1919, when the Government paid the contractor \$2,250 for 10,000 basins.....	\$204. 64
2. Interest on \$19,291.67 (the balance due on the 8,600 basins and 127,000 cups), at 6 per cent, from March 4, 1919, to April 30, 1919, when the Government paid the claimant said \$19,291.67.....	180. 05
3 Storage, labor, drayage, and restrictions placed upon regular operations which reduced production at the rate of \$50 per day from January 7, 1919, to April 10, 1919, the date of loading remainder of basins and cups to be delivered under agreement, due to delay in receiving shipping instructions.....	4,000. 00

DECISION.

1. Item 1 and item 2 of the claim herein are for interest. Section 1091 of the Revised Statutes provides:

"No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, *unless upon a contract expressly stipulating for the payment of interest.*"

2. There is nothing in the settlement contract nor in the original contract which expressly stipulates the payment of interest.

3. This Board is therefore of the opinion that the first two items of claimant's claim can not be allowed. As was said in *National Home v. Parrish*, 229 U. S. 494:

"Generally, interest is not allowable on claims against the Government, unless it has stipulated to pay or it is given by statute."

4. As to item 3, this Board is of the opinion that the goods for which storage, restrictions, etc., is claimed were not left in claimant's factory an unreasonable length of time, as the settlement contract had expressly released the Government from all expenses up to its date of approval on March 3, and the goods were shipped early in April; that they were to load them aboard the necessary cars and that the Government is not liable for the amount charged as storage, labor, drayage, and restrictions as set forth in item 3.

5. This Board is also of the opinion that claimant having entered into a contract with the United States Government, through its duly authorized agent, whereby it is provided that the payment of the amounts contained in said agreement by the Government "shall constitute full and final compensation for articles or work delivered, * * * services rendered and expenditures made under the original contract and this agreement," and these payments having been made by the Government, claimant is not entitled to recover for any of the items claimed herein.

DISPOSITION.

1. A final order denying relief will issue.
Col. Delafield and Mr. Averill concurring.

Case No. 512.

In re CLAIM OF WILLIAM F. FRETZ.

1. **BONUS.**—Where a claimant received a clothing contract without a bonus clause and was thereafter informed that clothing contractors were entitled to a bonus for saving yardage by special care in cutting material, but did not use any extra care by reason of such notice, and on completion of this contract requested and received another contract for 1,931 garments in order to utilize the yardage saved on the first contract, claimant is not now entitled to payment of the bonus.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, arising out of a proxy-signed contract for woolen breeches. Held, claimant is not entitled to relief.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This case arises under the act of March 2, 1919.

Statement of claim, Form B, under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, was filed originally with this Board. Claimant seeks compensation in the amount of \$2,026.83, which is alleged to have been the value of yardage saved by the contractor on cloth allowed for the performance of his contract with the United States, and is claimed by reason of the provisions of the so-called "bonus clause" in clothing contracts, which clause was the subject of the decision of this Board in the case of Wanamaker & Brown, No. 2133, dated October 6, 1919.

FINDINGS OF FACT.

It appears that on September 5, 1917, contract No. 838 was executed on behalf of the United States by Capt. V. Stone, Quartermaster Reserve Corps, for Col. M. Gray Zalinski, Quartermaster Corps, which contract provided for the manufacture from materials furnished by the Quartermaster Corps, of 32,000 pairs of wool breeches at 95 cents per pair. This contract was not executed by the claimant until December 15, 1917.

The contract did not contain the bonus clause. It has been fully performed and compensation paid by the United States and accepted by the claimant pursuant to these terms. It was completed and all deliveries made a few days after February 11, 1918. The claimant

saved sufficient yardage out of the cloth furnished for this contract to make 1,931 breeches. (Record, p. 15.) The claimant asked for, received, and performed a supplemental contract for the manufacture and delivery of the said number of breeches, and thus utilized the residue of the cloth so furnished.

It was paid for the said breeches on delivery. The agreement covered by the supplementary contract was made on or about February 11, 1918. (Record, p. 14.)

On or about January 11, 1918, the claimant received the following letter from the officer of the Philadelphia depot quartermaster:

"1. Your attention is directed to the following clause:

"That in cutting textile materials furnished by the United States for use in the manufacture of garments, etc., under this contract the contractor shall use best efforts to avoid all possible waste. For the additional work and special care so involved the contractor shall be paid, as separate compensation and premium, an amount equal to twenty per cent of the net cost price of such Government-owned textile materials to the extent of the saving of uncut yardage in the piece (piece goods) on comparing the quantities actually used in the cutting with the allowances for the purpose listed in the accompanying schedules—the material of the yardage so saved to remain the property of the United States. There shall not, however, be any skimping whatever in the cutting for the garments, etc., and in event of the violation of this condition no compensation shall be made for the saving in yardage resulting from the lays of such skimmed cutting, and the Government shall also have the election of annulling the contract for such cause."

"2. It is requested that the contractor consider the same as binding under the above-mentioned contract.

"2. Please acknowledge receipt.

"By authority of the depot quartermaster:

"V. STONE,
Captain, Q. M. R. C., Asst. to D. Q. M."

The claimant was aware on and after November 1, 1917, that the bonus clause was in process of incorporation in clothing contracts. He testified that he used no greater care or skill in cutting by reason of the bonus clause. He asks for compensation pursuant to the provisions of the bonus clause as if the said clause had been incorporated into its original contract, or for such compensation as the above state of facts warrants.

DECISION.

The claimant executed the original contract on December 15, 1917, after he was aware of the bonus provision. This contract did not contain the bonus clause. It must be presumed to contain the entire understanding of the parties up to that time with relation to the subject matter, which entire understanding did not include any provision for additional compensation for saving cloth. There can, therefore,

be no additional compensation awarded for cloth cut prior to December 15, 1917.

There is no evidence of any agreement between December 15, 1917 and January 11, 1918 with reference to the bonus clause, and there can be no recovery of compensation for cloth cut during this period.

On February 11, 1918 an agreement was made for the disposition of the cloth saved whereby the contractor received additional work and additional compensation for this work. The inference is that this supplemental contract was intended to and did cover the intention of the parties with reference to the cloth saved, including compensation for saving it. It did not provide for additional compensation beyond the agreed price for the articles delivered. Hence no additional compensation can be awarded for saving in cloth between January 11, 1918, and the date of completion.

DISPOSITION.

A final order will be entered denying relief and dismissing the claimant's claim.

Col. Delafield, Mr. Bryant, and Mr. Eaton concurring.

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Case No. 2350.

In re **CLAIM OF STANDARD ROLLING MILLS (INC.).**

- 1. SETTLEMENT AGREEMENT PRIOR TO ACT OF MARCH 2, 1919.**—Prior to the passage of the act of March 2, 1919, the Secretary of War had no power to enter into an agreement in settlement of an informally executed contract. Such an agreement executed February 11, 1919 is void and, therefore, a release contained therein is of no effect and claimant is now entitled to be paid certain items which were disallowed through error.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a proxy-signed contract. Held, claimant is entitled to relief.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This is an appeal from a decision of the Classification Claims Board, Settlement Division, Director of Finance, Washington, D. C., on a claim for \$262.65, under an informal contract.
2. The claimant, under a written proxy-signed agreement with the Government dated May 14, 1918, partially performed at the time it was suspended on account of the armistice, executed a settlement contract dated February 11, 1919, in which claimant released the Government in the usual form.
3. Before the execution of such settlement agreement and on August 29, 1918, a voucher covering items properly due and payable under said contract dated May 14, 1918, had been duly issued to claimant for the payment of certain items, including the two items which are the subject of this claim, aggregating \$262.65, which two items were, by unexplained error of the Finance Office, disallowed claimant on payment of the voucher. These improperly disallowed items were not included in the settlement contract solely because claimant thought they had been or would be paid by the Government under said voucher, as properly they should have been.
4. It is clear that by reason of the mistake of the finance officer, in improperly striking from the voucher the two items mentioned, a fair and equitable adjustment of the dispute between the claimant and the Government requires the payment of this claim.

5. Under said voucher claimant was entitled to receive payment of three items, as follows:

Aug. 29. Contract P7901-2340A, 100,000 lbs. pig lead at \$7.75 per cwt. on lead allotment authorization No. 8-158-----	\$7,750.00
Freight on lead allotment No. 18-158 applying on contract P7901-2340A from St. Louis, Mo., to New York, N. Y., for 100,000 lbs. pig lead at 25½¢ per cwt.-----	255.00
War tax on above freight charges at 3%-----	7.65
Total-----	8,012.65

The said settlement contract, dated February 11, 1919, called for payment to claimant of the sum of \$33.46 in full and final settlement of said contract of May 14, 1918.

Of the foregoing items, claimant has already been paid the item of \$7,750 and the item of \$33.46.

DECISION.

Prior to the passage of the act of Congress of March 2, 1919, commonly referred to as the Dent Act, the Secretary of War had no power to enter into an agreement settling an informally executed contract such as that of May 14, 1918, and therefore the settlement agreement of February 11, 1919, between the claimant and the United States is and is held to be void and of no effect.

It is clear from the facts in this case that an injustice was done the claimant by the act of the zone finance officer in disallowing the two items of \$255 and of \$7.65, respectively, in the voucher of August 29, 1918.

It is the decision of this Board that a statutory award be, and hereby is, made to the claimant of the entire sum due claimant under said proxy-signed agreement and under said voucher; but inasmuch as the claimant has already received payment of \$33.46 under said settlement contract and has also received payment of the said \$7,750, these two amounts shall be deducted from final payment of the statutory award.

DISPOSITION.

This Board will make a statutory award in accordance with this decision and will cause the same to be executed on behalf of the United States and by the claimant and to be transmitted to the appropriate finance officer for payment.

Col. Delafield and Mr. Shaw concurring.

Case No. 1185.

In re CLAIM OF WILLIAM K. STAMETS.

1. **CHANGES IN SPECIFICATIONS OF FORMAL CONTRACT.**—Where claimant, under a formal contract, was manufacturing certain machines for the War Department, and the contract provided that the Chief of Ordnance, by written notice, might make changes in the drawings and specifications of said machines, and that if such changes involved additional expense, a fair addition might be made to the contract price; and where, in compliance with duly executed instructions, claimant made changes in said machines, and the same caused additional expense, a claim exists for adjustment by the Secretary of War.
2. **CLAIM AND DECISION.**—Claim is made under General Order 103 for the sum of \$1,800, and is based upon changes and specifications made in performing a formal contract for the manufacture of lathes. Held, that a claim exists for adjustment by the Chief of Ordnance in accordance with the express terms of the contract.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

This claim was first presented to the Pittsburgh District Ordnance Claims Board, and was forwarded by that board to the War Department Board of Contract Adjustment on July 16, 1919, upon the theory that it was a Class B claim under the act of March 2, 1919. It comes before this Board, however, for determination of the matter in controversy in pursuance of General Orders, No. 103, War Department, 1919, and involves a claim for \$1,800 based upon the following facts and circumstances:

1. The petitioner, William K. Stamets, entered into contract No. P5890-339M, as supplemented by contract No. P5890-339M of June 8, 1918, and as further supplemented by contract No. P5890-339M of August 15, 1918 (the original contract and the first supplemental contract executed on behalf of the United States by Colonel Samuel MacRoberts, Ordnance, by Lieutenant Colonel Charles N. Black, contracting officer, and the second supplemental contract executed on behalf of the United States by Lieutenant Colonel William Williams, United States Army, contracting officer) by which petitioner undertook to manufacture 10 gun-boring lathes in accordance with certain drawings and specifications. These lathes were to be fitted with boring-bar rests intended to carry boring rods to

bore the hoops and jackets, as well as the tubes of the 8-inch guns, which made it necessary to bush six of the lathes to carry 10-inch boring bars and four of them to carry 7-inch boring bars.

2. After the above contracts were made and after six of the lathes had been fitted with 10-inch bushings on the boring-bar rests, the Government changed its intention with respect to these boring lathes and determined to send them to France to be used exclusively for boring liners and tubes of 8-inch guns, which made it necessary that the six lathes which had been fitted with 10-inch bushings in the boring-bar rests should be changed to 7-inch bushings.

3. The original contract No. P5890-339M contains the following provision:

“ ARTICLE IV.

“ The Chief of Ordnance may, by written notice to the contractor at any time, make changes in the drawings and specifications or supplemental or substituted drawings and specifications which relate to, form a part of, or are added to this contract. If such changes involve additional expense, a fair addition may be made to the contract price, but if such changes involve less work or labor or material a fair deduction may be made therefrom, all as shall be determined by the Chief of Ordnance. No claim on account of any such change will be made or allowed unless the same has been ordered in writing by the Chief of Ordnance.”

When the Ordnance Department determined to send these boring lathes to France to be used exclusively for boring liners and tubes of 8-inch guns, which necessitated the use of 7-inch bushings in the boring bar rests, the matter came to the attention of Maj. Charles D. Westcott, Ordnance, United States Army, who was in charge of technical work in the preparation of machine tools and facilities for the manufacture of heavy guns, and sometime in August, 1918, he directed the petitioner to remove the 10-inch bushings in the boring bar rests in the six gun lathes and to replace them with 7-inch bushings. This order was complied with by petitioner. Later on under date of August 23, 1918, Maj. Westcott wrote a letter to petitioner, from which the following quotation is made:

“ In my opinion it would be advisable to build all Stamet lathes to carry boring bars 7 inches in diameter. * * * Necessary changes in specifications can doubtless be arranged for through Captain Turner, of Ordnance Production Division.

“ CHARLES D. WESTCOTT, *Major, Ord., U. S. A.*”

4. Upon the question of the authority of Maj. Westcott to give such an order on behalf of the Chief of Ordnance, and the effect of the notice given by him, the following is quoted from a letter re-

ceived by this Board under date of January 19, 1920, from Maj. Gen. C. C. Williams, United States Army, Chief of Ordnance:

"1. Charles D. Westcott, major, Ordnance Department, U. S. A., was, as was set forth in his affidavit, chairman of a committee which had in charge engineering and technical work on machine-tool equipment during the months of July and August, 1918, and thereafter for a considerable period. As chairman, Major Westcott had general authority to make such changes as might, in the judgment of his committee, be necessary or desirable to expedite the production of machine tools.

"2. The letter of Major Westcott under date of August 23, 1918, to William K. Stamets Company, Pittsburgh, in relation to 7-inch boring bars on Stamets' lathes, then under contract, was written in the ordinary course of his duties, and as chairman of the committee he had authority to order such changes in reducing from the 10-inch to 7-inch as are indicated in this letter."

DECISION.

1. It is the opinion of this Board that the petitioner changed the bushings in the boring bar rests on the six gun-boring lathes from 10-inch bushings to 7-inch bushings at the direction of the Chief of Ordnance and in pursuance of the terms of Article IV of contract No. P5890-339M of April 13, 1918.

2. The War Department Board of Contract Adjustment therefore recommends to the Claims Board, Ordnance Department, that the change in the size of the bushings on the six gun lathes be made the subject of an adjustment under the terms of the written contract existing between the parties as hereinbefore set out, if there has been no such adjustment thereunder; and if there has been an adjustment which, by the express intendment of the parties, excludes and eliminates the subject of the cost involved in the change in the size of these bushings that such settlement agreement be re-formed so as to adjust and settle all matters between the Government of the United States and petitioner with respect to the change in the size of the bushings as hereinbefore mentioned.

DISPOSITION.

A copy of this finding of facts and decision will be transmitted to the Claims Board, Ordnance Department, for its information and guidance.

Col. Delafield and Lieut. Col. McKeeby concurring.

Case No. 2294.

In re CLAIM OF THE SWEETS CO. OF AMERICA.

1. **JURISDICTION—TIME OF MAKING INFORMAL AGREEMENT.**—Where claimant on suspension of a contract was orally instructed on November 12, 1918 to hold Government materials until removed by the Government, the implied agreement for payment of storage, based upon these instructions, was made too late to come within the provisions of the act of March 2, 1919.
2. **RELEASE, MISTAKE IN.**—The claim that there was mutual mistake in supposing that the release in a supplemental agreement covered only materials owned by claimant, and not materials owned by the Government, is held to be without merit, and the release is a bar to this claim.
3. **CLAIM AND DECISION.**—Appeal under General Order 103 from the decision of the Claims Board, Chemical Warfare Service. The claim arises out of a formal contract for anti-dimming sticks. Relief denied.

Mr. Howe writing the opinion of the Board.

This claim is presented under General Order No. 103.

No formal statement of claim has been filed. The claim was presented originally in affidavit form to the Claims Board, Chemical Warfare Service, and comes to this Board on appeal from the decision of that board.

The claim is for the rental value of a part of claimant's premises and for losses in claimant's civilian production over a period from November 11, 1918, to the latter part of January, 1919, during which claimant's premises were occupied by Government-owned material left over after the suspension of an uncompleted contract.

A hearing was held February 2, 1920.

FINDINGS OF FACT.

1. Claimant is a manufacturer of cough drops with a factory in the building at 420 West Forty-fifth Street, New York City.

2. Prior to November 12, 1918 claimant received a formally executed contract from the Chemical Warfare Service, United States Army, dated September 15, 1918, for the manufacture of anti-dimming sticks on which it was engaged up to the time of the armistice. Under this agreement, certain materials were to be furnished by the Government.

3. This contract was suspended before completion, on November 12, 1918, on notice from Capt. K. B. Blake, of the Chemical Warfare Service.

4. At the time of this suspension there remained in claimant's building certain Government materials which had been supplied to claimant pursuant to the contract of such quantity as to occupy most of one floor and to prevent the use of this floor by claimant in its civilian business.

5. Claimant alleges that on November 12, 1918, claimant was told by Capt. Blake to stop work under its contract, and on asking him what should be done with the Government materials on hand was told by him to hold it until the Government "packed it up and would take the stuff away." On December 10, 1918, in response to a request from claimant as to the disposition of the material, claimant received a letter from Capt. Blake, stating that it was his "understanding that it would be taken out very shortly." (Claimant's Exhibit 1.)

6. The material remained on claimant's premises until about the middle of January, 1919, when claimant informed Lieut. Rene Hoguet, of the Contract Adjustment Section of the Chemical Warfare Service, that unless the material was removed at once it would present a bill for it. Shortly thereafter it did present to Lieut. Hoguet a bill covering the items in this claim for rent and loss of production. A few days later the material was removed by the Government.

7. In the meantime claimant had been negotiating with Lieut. Hoguet for an adjustment of its contract, and on January 29, 1919 reached an adjustment which was embodied in a signed agreement containing the following clause:

"5. The contractor does hereby remise, release, and forever discharge the United States of and from all and all manner of debts, dues, sum or sums of money, accounts, claims, and demands whatsoever, due or to become due in law or in equity under or by reason of, or arising out of said original contract, except the sum or sums herein agreed to be paid."

The sum of money referred to in the above clause was \$1,022.49, made up of \$537.64, covering material belonging to the contractor, and \$484.85, described as "On presentation of invoice for damages after this contract has been executed."

8. At the hearing it developed that the claim is presented on two alternative theories:

(1) Claimant alleges that the instructions received from Capt. Blake on November 12, 1918, supported by his letter of December 10, 1918 (Exhibit 1), constitute an agreement under the act of March 2, 1919, in accordance with which claimant is entitled, independently of its contract and of the settlement agreement, to charge at a reasonable price for the storage of the material while on its premises thereafter, and to be recompensed for its loss in production during that period.

(2) That even if no such agreement under the act of March 2 can be shown and claimant must depend on its rights under its contract, if any, still the release quoted above in the agreement of January 29, 1919, is not binding on the claimant, because it was executed by claimant and the Government under a mutual mistake of fact. This mistake claimant alleges was made by both claimant's representatives and Lieut. Hogue when they reached an adjustment of the contract, and consisted in supposing that the release covered only materials owned by the claimant, whereas on its face it appears to cover also material owned by the Government. That as the claim arises out of Government-owned material it has, therefore, not been released by the settlement agreement. There exists accordingly an obligation on the part of the Government to pay for the storage and the loss of profits implied from the fact that the Government failed to remove the material within a reasonable time after the suspension of the contract.

DECISION.

1. As to the alleged agreement with Capt. Blake, it seems sufficient to note that it is not claimed to have come into existence until November 12, 1918, and for this reason it can not give rise to any obligation under the act of March 2, 1919.

2. As to the implied agreement arising from the failure of the Government to remove the material before January, 1919, the evidence does not show that the settlement agreement was executed under such mutual mistake of fact as would justify relieving the claimant from its stated terms, but rather that it should properly be considered as covering the matters involved in this claim and as binding on claimant.

DISPOSITION.

1. The claim should be denied.

Col. Delafield and Maj. Hope concurring.

Case No. 2160.

In re CLAIM OF HEINE CHIMNEY CO.

1. **CONTRACT, CONSTRUCTION OF.**—Where a contract for the construction of a chimney provides that the Government will guarantee the free and unobstructed use of a railroad siding so that the materials may be unloaded from cars within 100 feet of the chimney site, and while the cars are so unloaded, yet, it is necessary to haul the materials by way of a detour for a distance of 300 feet, claimant is entitled to be reimbursed for transporting the materials from the cars to the chimney site, but not the cost of unloading.
2. **SAME—INTENTION OF PARTIES.**—The provisions of a contract will be construed in the light of the purpose for which they were inserted, and a literal construction which defeats the intention of the parties, as evidenced by said provisions, will not be upheld.
3. **CLAIM AND DECISION.**—Claim under General Order 103 for reimbursement of expense of hauling materials a greater distance than is provided in the contract. Held, claimant entitled to recover for hauling, but not for unloading the materials from the cars.

Mr. Huidekoper writing the opinion of the Board.

FINDING OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Orders, No. 103, War Department, November 6, 1918, and is for reimbursement in the sum of \$373.81 under the following circumstances: On May 21, 1918, requisition No. 3 was issued by the Construction Division of the Army to the claimant, Heine Chimney Co., for—

"1 175' 0'' high x 7' 0'' diameter at top radial brick stack, buff color with 3-point lightning rod, cast-iron capped, erected complete as per your proposal #5469 of May 1, 1918, \$4,160.56."

This chimney was to be erected at the Tuberculosis Hospital, at Denver, Colo. There were two amendments to this requisition, the second one being dated June 11, 1918, calling for a chimney 175' 0'' x 8' 6'', at \$6,069.

2. Paragraph 12 of claimant's proposal No. 5469 of May 1, 1918, was as follows:

"12. General conditions.—The conditions upon which this proposition is based are that the owners will guarantee free and unob-

structed use of railroad siding so that cars may be delivered and unloaded within 100 feet of the chimney site; * * *

3. There was a railroad siding within approximately 100 feet of the chimney site, but it ran in front of the power house, whereas the chimney site was in the rear of the power house. This situation made it necessary to unload the material from the freight cars onto trucks and haul it a distance of about 300 feet to the chimney site. The unloading and hauling was done by the Construction Division of the Army, and \$523.04 was deducted from the contract price. Claimant admits that the charge for unloading from the freight cars onto the trucks should be charged to it, viz, \$149.23, or at the rate of 50 cents per ton, but insists that the cost of transporting the material from the freight cars to the chimney site is properly chargeable against the Government, and it is for this only that claimant seeks reimbursement.

The Construction Division of the Army disallowed this claim on the theory that as the material was delivered at the railroad siding 100 feet from the chimney site "by direct air route" this amounted to a compliance with the terms of the contract.

DECISION.

1. The purpose for which the specification above quoted was made a part of the contract was to insure that the contractor would not have to move the material a distance of more than 100 feet. If the railroad siding was within 100 feet of the chimney site, but was so situated that a detour of 300 feet was necessary in order to get the material to the chimney site, the very purpose for which this provision was inserted in the contract was defeated.

2. Claimant is entitled to be reimbursed the reasonable cost of transporting the material from the cars to the chimney site, but not for the cost of unloading it from the cars onto the trucks.

3. The Board of Contract Adjustment hereby transmit its decision to the Claims Board, Construction Division of the Army, for appropriate action.

Col. Delafield and Maj. Taylor concurring.

Case No. 759.

In re **CLAIM OF FRED T. LEY & CO. (INC.).**

1. **CONTRACT, CONSTRUCTION OF—MEDICAL EXPENSE.**—Where a cost-plus percentage contract for the construction of a cantonment provides that the contractor shall be reimbursed for its actual net expenditure in the performance of the contract as may be approved or ratified by the contracting officer, in the construction of buildings (including a hospital) and that it be reimbursed for the cost of maintaining and operating a hospital, expenses incurred by the contractor in maintaining sick and injured employees in a hospital, operated by others, by the direction of the duly appointed representative of the contracting officer, are proper items of expense which the contractor should be reimbursed.
2. **CLAIM AND DECISION.**—Claim under General Order 103 for expenses of maintaining sick and injured employees in a hospital. Held, contractor entitled to reimbursement of such expenses.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Accounting Section of the Construction Division on a claim for payment of certain items amounting to \$737.72, on a formally executed contract as hereinafter appears.
2. The case was heard on January 15, 1920, and the claimant was represented at the hearing.
3. Under date of June 11, 1917, the claimant entered into a contract with the Government for the construction at Ayer, Mass., of—
“buildings and other utilities, except roads, stoves, bunks, mattresses, ranges, and refrigerators, for an Infantry division,”
including certain additional units.
4. The cantonment was named Camp Devens. It contained about 10,000 acres. The contract included something over 1,500 buildings, and as many as 9,000 men were at times working on the job. The total expense involved amounted to about \$10,000,000.
5. The contractor was notified on June 11 that a contract would be given it, and the contract was received and executed about three weeks later.
6. Upon being notified that it would receive a contract, the contractor immediately started work.

7. Maj. Edward Canfield, Jr., was the constructing quartermaster at the location at that time and was the representative of the contracting officer, and as such had immediate control and supervision of the construction of the cantonment.

8. The provisions of the contract relating to what should be done thereunder are as follows:

"ARTICLE I. *Extent of the work.*—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities and supplies, and do all things necessary for the construction and completion of the following work, at Ayer, Massachusetts:

"Buildings and other utilities, except roads, stoves, bunks, mattresses, ranges, and refrigerators, for an Infantry division," etc.

9. The provisions of the contract relating to approval of the work are as follows:

"ARTICLE II. *Cost of the work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer, and as are included in the following items," etc.

"(g) Buildings and equipment required for necessary field offices, commissary, and hospital, and the cost of maintaining and operating said offices, commissary and hospital," etc.

"ARTICLE XV. It is understood and agreed that wherever the words 'contracting officer' are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War, and any duly appointed representative of the contracting officer."

10. By special order of the Secretary of War, dated July 16, 1918, Col. I. W. Littell was appointed contracting officer, within the meaning of the contract. By order of Col. Littell, dated August 16, 1917, constructing quartermasters were "duly appointed representatives of the contracting officer," within the meaning of the contract. Copies of the above orders are in the papers in case No. 754.

11. In the course of the work, before the hospital had been constructed, workmen were incapacitated from time to time by sickness and minor injuries other than those caused by accident. Acting under the approval and direction of Maj. Canfield, the claimant sent such workmen for treatment to a hospital maintained by the Liberty Mutual Insurance Co. and seeks here to recover the expense thus incurred.

12. There were a number of reasons why this seemed advisable to Maj. Canfield. In the first place, failure to take care of small injuries, such as sunburn, attacks of indigestion, colds, grippe, etc., would create discontent among the men. Secondly, if the men were not sent for treatment they would have to leave the work and go

elsewhere, and their services would be lost at the cantonment. Thirdly, there were no medical officers of the Government in the cantonment available to take care of these small but fairly numerous disabilities.

13. There was evidence that similar expenses have been approved and paid by the Government in connection with this contract.

DECISION.

1. The expense in this case was incurred at the direction of the quartermaster in the camp, who was also duly appointed representative of the contracting officer, authorized under the contract to approve items for which the contractor should receive pay. We find that the expense was properly incurred and fairly within the spirit and letter of Article II, section (g), relating to the hospital and maintenance of hospital.

2. The claimant is entitled to recover the amount which it has expended for the purposes outlined above.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, Washington, D. C., for appropriate action.

Col. Delafield and Lieut. Col. Carruth concurring.

Case No. 341.

In re **CLAIM OF THE SPECIALTY KNIT GOODS MANUFACTURING CO.**

1. CONTROLLED INDUSTRY—EXCESS MATERIAL—DISPOSITION OF.—

Where claimant entered into a contract to furnish a quantity of cloth to a contractor doing Government work, and where the yarn from which such cloth was manufactured was allotted to the claimant by the Government with an agreement limiting its use for that purpose, and where claimant had on hand an excess amount of cloth and yarn and asked permission of the Government to dispose of same to civilian trade, and where the Government refused such permission, there arose an obligation under the act of March 2, 1919, to reimburse claimant such loss as it suffered by reason of its compliance with the orders of the officers of the United States Government.

2. CLAIM AND DECISION.—This claim arises under the act of March 2, 1919.

Claimant seeks reimbursement of loss sustained by reason of having a quantity of yarn on hand which depreciated in value after the signing of the armistice. Held, that refusing permission to the claimant per request to sell its yarn and cloth imposed an obligation on the United States Government under the act of March 2, 1919, to reimburse claimant such loss as it suffered by reason of its compliance with the orders of the officers of the United States.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$37,048.54, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant company is in the business of weaving woolen cloth. In May, 1918, it entered into a contract with Richman, Newburger & Travers for the weaving of cloth for puttees. The latter concern had entered into a contract with the United States, numbered 2602-N, for the making of spiral puttees.

3. The United States owned or controlled substantially the entire supply of wool in the country between April, 1918, and November 12, 1918. The claimant was obliged in order to obtain yarn for the weaving of the cloth which was to be manufactured into puttees under contract 2602-N to promise the United States that it would use the yarn

solely for making cloth for contract 2602-N, and the spinners of the wool into yarn were required to promise as a condition of receiving the wool from the United States that the yarn should be delivered to the claimant to be used by it in making cloth for the performance of contract 2602-N. These promises and stipulations were entered into by the claimant and by the spinner, and a portion of the yarn was delivered to the claimant and a portion of the cloth was manufactured and delivered to Richman, Newburger & Travers.

4. There was some delay on the part of the spinners in furnishing yarn to the claimant, and some delay on the part of the claimant in furnishing cloth to the makers of puttees.

5. On October 15, 1918 the claimant had on hand, according to its testimony, 8,148 pounds of khaki yarn and 2,150 yards of khaki cloth which it had manufactured for contract 2602-N. On or about that date the claimant was notified by Richman, Newburger & Travers that contract 2602-N had been fully performed and that no further cloth would be needed from the claimant, and that they had been obliged to buy cloth from other manufacturers in order to complete the performance of contract 2602-N.

6. This action of Richman, Newburger & Travers left the claimant with yarn and cloth on its hands which it wished to sell. It immediately made application to Capt. Ketchum, who was a captain in the Quartermaster Corps, serving in the Wool, Top, and Yarns Branch, for permission to sell the cloth which it had manufactured and the yarn which it had on hand, for both of which materials there was at that time a large demand from civilian sources, and for which a high price could have been obtained. Permission to sell either the cloth or the yarn was denied by Capt. Ketchum. He suggested that he would consent to the sale to the Red Cross or the Young Men's Christian Association, if either of those organizations desired the yarn or the cloth. The claimant immediately tried to dispose of the material to the Red Cross and the Young Men's Christian Association but was unsuccessful.

7. The claimant made numerous requests between October 15, 1918, and November 12, 1918, of Capt. Ketchum and of the Knit Goods Branch for permission to sell the yarn and the cloth, but permission to sell either material was refused.

8. Capt. Ketchum's superior was Mr. Albert Elliott, Chief of the Wool, Top, and Yarns Branch, and his affidavit, Capt. Ketchum's testimony, and statements made by Mr. Malcolm Donald, Chief of the Clothing and Equipage Division, are all to the effect that no concern having in its possession wool cloth or wool yarn was allowed after April, 1918, to dispose of any of it to the civilian trade; that there was a great demand for both cloth and yarn and the prices were high, but that the need of wool for Government purposes was

so great that it had become the established policy of the divisions having the matter in charge to take careful precautions against the use of any wool except for the performance of Government contracts.

9. The action of the Government in refusing to permit this claimant to sell its yarn and cloth was in accordance with the universal practice obtaining in October and early November, 1918, and it was only in cases of emergency and after receiving authority from the War Industries Board that in one or two cases a small amount of wool was released and allowed to be manufactured for other purposes than for Government needs.

10. On November 12, 1918, permission to sell the yarn and cloth through civilian channels was given by the Chief of the Knit Goods Branch. The market value of both yarn and cloth had fallen as soon as the armistice of November 11, 1918, was granted.

DECISION.

1. The effect of the action of Capt. Ketchum in refusing permission to the claimant to sell its yarn and cloth is to impose an obligation on the United States to reimburse the claimant for such loss as it suffered by reason of its compliance with the orders of the officers of the United States. The record shows that Capt. Ketchum in requiring the claimant to hold its yarn and cloth from the market was acting in accordance with direct instructions from his superiors and the heads of the division to which he was assigned.

2. The *quantum* of the relief to which the claimant is entitled is to be determined in accordance with the rules and regulations that have been adopted and followed for the determination of losses in respect to materials like woolen yarn and cloth.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Lieut. Tanner concurring.

Case No. 2302.

In re CLAIM OF A. G. PICKETT.

1. **TITLE—DESTRUCTION BY FIRE—DELIVERIES SUSPENDED.**—Where claimant had a contract for the delivery of cordwood, after the suspension of which a fire occurred and destroyed a quantity of wood which claimant had cut but had not delivered, the loss must be borne by the claimant, since the title to the wood was in him and there was nothing to bring the case within the rule that where a delivery has been delayed through the fault of one of the parties the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.
2. **CLAIM AND DECISION.**—Appeal under General Order 103 from Claims Board, Director of Purchase, on a claim based upon a formally executed contract for cordwood. The decision of the Claims Board disallowing claim for wood destroyed by fire is affirmed.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the Claims Board, Director of Purchase, on a claim for \$2,970.19, arising from a formally executed contract, dated July 1, 1918.

2. The contract provides:

“That the said contractor shall furnish and deliver during the period commencing July 1, 1918, and ending December 31, 1918, the following supplies for or at the military stations, in the manner and at the prices stated in this contract; deliveries to be made in such quantities, at such times, and in such bins, sheds, bunkers, or other places of storage at the military stations named, as may be required by the receiving officer or agent of the Quartermaster Corps, unless the minimum quantities to be delivered are stated, or different conditions as to place and time of delivery are expressly set forth in this contract, viz:

“2,500 cords wood, soft, according to specifications attached hereto, cut in four (4) foot lengths at four dollars and fifty cents (\$4.50) per cord of one hundred twenty-eight (128) cubic feet.”

3. On July 8, 1918, the claimant wrote Maj. Ware, with whom he contracted, that he was ready to commence shipment. He was informed by Capt. Throud, the camp supply officer, that he could not ship then. On August 24, 1918, he received a letter advising him to commence shipment. He thereafter delivered 518½ cords of wood

and was paid therefor. On November 12, 1918, Lieut. Dunn, the camp officer, instructed the claimant to suspend shipments. The claimant suspended operations and kept a foreman, a truck driver, a helper and a team of mules, which he rented, in the woods some distance from the camp, awaiting further instructions. On December 15, 1918 375 cords of wood, which the claimant had cut and piled in the woods, were burned by a forest fire.

4. Shortly after the said suspension the claimant talked with Lieut. Dunn about disposing of the wood, and explained that he was making expenditures for pay of his men in the woods, and for feed and rent of the mules. Lieut. Dunn told the claimant that he could not relieve him of the contract, as hostilities might be resumed at any time.

5. In August, 1918, a number of the claimant's men were taken ill and he thereupon installed a wood-cutting machine in order to be able to fulfill his contract. He also purchased a motor truck.

6. The claim is as follows:

1. Stumpage, 1,981½ cords, @ 25¢-----	\$495. 37
2. 374 cords ready for delivery Nov. 12, 1918, destroyed by fire Dec. 15, 1918, @ \$2.98-----	1, 095. 82
3. Depreciation of equipment-----	700. 00
4. Pay roll, rent, and feed of mules-----	679. 00
Total-----	2, 970. 19

7. The claimant testified on October 27, 1919, before the Zone Purchase Advisory Board at Atlanta, Ga., and at that time agreed upon an adjustment offered of the said claim as follows:

1,660½ cords stumpage, @ 25¢-----	\$401. 56
374 cords destroyed by fire, @ \$2.50-----	935. 00
Salaries, rent, and feed of mules-----	679. 00
Total-----	2, 015. 56

8. The zone supply officer at Atlanta, Ga., recommended to the Claims Board, Director of Purchase, that the said claim be adjusted on the terms mentioned for a total of \$2,015.56. The Claims Board, Director of Purchase, denied the item of the claim amounting to \$935 for 374 cords of wood burned, on the ground that the claimant had title to the wood destroyed, and delivery was not required under the contract until December 31, 1918, and that under the circumstances the Government was not liable for the wood destroyed by fire. The claimant thereupon appealed to this Board on all questions involved in the claim.

DECISION.

1. The formal contract requires the delivery of 2,500 cords of wood by December 31, 1918. After the suspension of deliveries on Novem-

ber 12, 1918, the claimant tendered to the Government 374 cords of wood, which the claimant had cut and piled near the place of cutting. He was not allowed to deliver it or otherwise dispose of it. He was in effect required to keep it until he received instructions as to its disposal. While awaiting instructions the fire occurred without the fault of the claimant.

Burdick on Sales (p. 88) states a rule adopted by some of the courts in relation to the risk of the buyer when the buyer causes delay in delivery:

"The English statute provides that where a delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. * * * This rule has been approved by some American courts and has been embodied in the uniform sales act, section 20."

In the case before us we are unable to find that delivery was delayed through the fault of the buyer, within the provisions of the above rule; because by the terms of the contract deliveries were to be made at such times and in such quantities as the receiving officer should designate and were to continue until December 31, 1918. It seems, therefore, by the terms of the contract the Government had the right to delay deliveries until a reasonable period before December 31, 1918.

2. In a similar case the Supreme Court of the United States denied relief to a seller where the delivery of goods was delayed by the Government and the goods were lost without the fault of the seller, while in transit and before title had passed to the Government. In the said case, *Grant v. The United States*, 7 Wallace, 331, the Government delayed the inspection of certain goods which the plaintiff was required to deliver to military posts in Arizona. The goods were later shipped and were captured by the public enemy. The Supreme Court said (p. 338):

"If, however, it be admitted that the Government was in default in not inspecting sooner, that default had no connection with the subsequent injury suffered by the claimant and was not the proximate cause of it. In such a case the rule of laws applies, that where the property is destroyed by accident the party in whom title is vested must bear the loss. * * * Whether there are equities in this particular case, and if so whether they require that the claimant should be reimbursed, in whole or in part, for the capture of the goods under the circumstances, are questions that must be addressed to Congress."

3. The decision of the Claims Board, Director of Purchase, is sustained.

Col. Delafield and Mr. Harding concurring.

Case No. 1761.

In re CLAIM OF MIDVALE STEEL & ORDNANCE CO.

1. **EXCESS MATERIAL—BUSINESS RISK.**—Where claimant, while performing several contracts with the Government for the manufacture of shell steel and other munition products, purchased ferrosilicon in excess of the amount needed to complete said contract, it did so at its own risk, and under such circumstances no obligation arose, under the act of March 2, 1919, on the part of the United States Government to reimburse the claimant for its loss thereby sustained.
2. **CLAIM AND DECISION.**—This claim for \$202,244.60 arises under the act of March 2, 1919, and is for loss alleged to have been sustained on purchases of ferrosilicon made preparatory to manufacturing shell steel during the duration of the war. Held, that no contract was made within the purview of the act of March 2, 1919, that obligated the Government to reimburse the claimant its loss thereby sustained.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. A statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$202,244.60, on the ground that the claimant purchased an extra quantity of ferrosilicon, which it alleges it purchased in order to meet the demands of the Government for the manufacture of shell steel and other munition products.
2. The claimant owns three plants situated at Nicetown, Pa., Coatesville, Pa., and Johnstown, Pa. The Nicetown works in ordinary times devoted about half of its production to armament and guns and the other half to commercial work, such as locomotive tires, general forgings, steel wheels, and tube steel. The Coatesville works was engaged in ordinary times in the manufacture of ship plates, boiler plates, plates for cars, etc. The Johnstown works in ordinary times manufactured steel for industrial purposes, such as wire, agricultural implements, railway materials, etc.
3. In the fall of 1917 claimant had difficulty in obtaining raw materials. About October, 1918, J. L. Replogle, Director of Steel Supply of the War Industries Board, urged Mr. A. C. Dinkey,

president of the claimant, to devote the claimant's plants to the production of war material during the continuance of the war and to make necessary provisions to insure an uninterrupted supply of the maximum output of its plants for the use of the Government during the war emergency. (See letter of J. L. Replogle to claimant, dated November 17, 1919.) During 1917 and 1918 claimant was on the verge of stopping the manufacture of shell steel a number of times because it had an insufficient quantity of ferrosilicon. When it had the opportunity in October, 1918, to obtain priorities by means of which to purchase a steady supply of ferrosilicon it began from that period to make purchases on the basis of about one year's supply ahead (pp. 63 and 87).

4. After the fall of 1917 it was necessary to obtain priorities in order to get raw materials for the manufacture of steel. In order to operate its plants in or after the fall of 1917, it was necessary for the claimant to make steel for Government purposes. Otherwise its plant would have been idle.

5. At the time of the armistice the claimant had more than 50 unfinished contracts with the United States, England, Italy, and France (pp. 137 and 140). The claimant was allowed to continue work on some of said contracts until January 1, 1919. After the armistice it received general suspension notices covering its contracts. On January 9, 1919, the claimant received a telegram as follows:

"Prime contractors having outstanding subcontracts for raw materials in cases of the quantity needed in connection with the articles to be completed under the terms of suspension request as agreed to, or cancellation notice, are hereby advised by direction of Lieut. Col. F. R. Ayer, recorder, Claims Board, Washington, to forthwith cancel such contracts and advise their subcontractors that no further work should be done."

6. Over and above the ferrosilicon the claimant had ordered for use in its various written contracts with the Government, the claimant had ordered a large quantity of ferrosilicon which was undelivered at the time of the armistice (p. 134). Shell steel required seven or eight times as much ferrosilicon as is used in ordinary steel (p. 146). The claimant was ordering ferrosilicon on a basis of 500 tons of 50 per cent ferrosilicon per month and 400 tons of the lower grade, and from 10 to 12 per cent per month, making a total of 900 tons of both grades per month, and was ordering a year's supply ahead. Early in 1919 the claimant canceled or otherwise settled the following contracts for ferrosilicon which had been ordered and which was then undelivered.

Name.	Material undelivered.	Amount of obligation.
International Paper Co.....	726 tons 50 per cent ferrosilicon, at \$147.50.....	\$107,085.00
U. S. Alloys Corp.....	940 tons 50 per cent ferrosilicon, at \$145.....	136,300.00
Fairbanks Morse Co.....	910 tons 50 per cent ferrosilicon, at \$145.....	131,950.00
Niagara Elec. Furnace Co.....	2,000 tons 50 per cent ferrosilicon, at \$145.90.....	291,800.00
Crocker Bros.....	113 tons 11 per cent ferrosilicon, at \$58.30.....	6,587.90
Do.....	166 tons 12 to 14 per cent ferrosilicon, at \$66.50.....	11,039.00
Do.....	1,200 tons 10 to 12 per cent ferrosilicon, at \$58.30.....	69,960.00
Bessie Furnace Co.....	600 tons 10 per cent ferrosilicon, at \$55.....	33,000.00
Do.....	600 tons 11 per cent ferrosilicon, at \$58.30.....	34,980.00
Do.....	360 tons 11 per cent ferrosilicon, at \$58.30.....	20,988.00
Do.....	160 tons 11 per cent ferrosilicon, at \$58.30.....	9,328.00
Do.....	153 tons 11 per cent ferrosilicon, at \$58.30.....	8,919.90
Total amount of obligations for undelivered material (7,928 tons).....		861,937.80

The cost to the claimant of making said cancellations and settlements it states was \$202,244.60, which amount it now claims.

DECISION.

1. After the supplies of fuel and raw materials for steel manufacture were controlled by the Fuel Administrator and other Government officials in the fall of 1917, it was necessary for the claimant to obtain priorities for fuel and raw materials before it could operate its plant. The claimant was asked by Mr. Replogle, of the War Industries Board, to supply itself with raw materials necessary to capacity production during the continuation of the war. It was left to determine for itself the amounts of fuel and raw materials it needed in advance. As it had experienced great difficulty in obtaining ferrosilicon during the year 1917 it took advantage of the priorities offered to order a year's supply of ferrosilicon in advance. At the time of the armistice it had contracted for 7,928 tons of ferrosilicon which had not been delivered. In addition to said amount it had other ferrosilicon on hand sufficient to fill contracts which had been made with the Government. No evidence was given as to what amount of ferrosilicon claimant should order other than the request of Mr. Replogle that it should supply itself with sufficient raw materials for capacity production during the war. It was the duty of the claimant, therefore, to order such amounts as it deemed necessary during the continuance of the war. It therefore took the risk, in placing its orders, of supplying itself with an undue amount in case of the early cessation of hostilities.

2. We find that no agreement was made between the claimant and the United States Government or its representatives, within the provisions of the act of March 2, 1919, which obligates the Government to reimburse the claimant for the purchase of the said ferrosilicon.

Col. Delafield and Mr. Fowler concurring.

Case No. 1713.

In re CLAIM OF LEWIS MANUFACTURING CO.

1. **JURISDICTION OF SECRETARY OF WAR TO ADJUST CLAIMS.**—In the absence of the act of March 2, 1919, the power of the Secretary of War to settle or adjust claims against the War Department is limited generally to two classes of cases: (a) those which arise upon contracts with the War Department executed in the manner prescribed by Revised Statutes, or in the manner authorized by some exception thereto; (b) to the recommending to the Treasury Department of payment upon the basis of quantum meruit or quantum valebat for necessary goods and services actually received and accepted by the War Department.
2. **SAME—CONTRACT—QUANTUM MERUIT.**—Where claimant had the right to sell certain articles at certain Government fixed prices or otherwise, or to hold the same in anticipation of commandeering proceedings by the Government, and claimant elected to hold the same, and the Government did not commandeer the articles, and afterwards all Government restrictions upon the sale of the articles were removed, there was no delivery or acceptance of said articles by the United States which would authorize the Secretary of War to recommend payment for the same upon a quantum meruit; and no agreement or obligation created on the part of the Government which the Secretary of War would have any right to pay or discharge.
3. **CLAIM AND DECISION.**—Claim is made which is irregular in form. Claimant seeks payment for losses sustained by it of \$3,778.94, due to the shrinkage in value of cotton linters held by it and storage charges upon the same. Held, that claimant is not entitled to relief.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

Statement of claim in this case was forwarded by petitioner's counsel under date of July 29, 1919, and filed with this Board on August 1, 1919. An amended or supplementary petition was filed on the 9th day of October, 1919. Petitioner asks for the sum of \$3,778.94, made up as follows:

Loss of 5½ cents per pound on sale of 89 bales of cotton linters, amounting to.....	\$2,479.91
Storage charges upon the same 89 bales of linters, amounting to.....	1,499.03

In the amended petition of October 9, 1919 petitioner's counsel states:

“The Board of Contract Adjustment and the Ordnance Claims Board have declined jurisdiction of this claim on the ground that

it is not founded upon an agreement. In this we take it they are correct, but we believe nevertheless that the facts create a liability on the part of the Government to pay for the loss incurred in complying with their orders under the doctrine of *United States vs. Russell* (13 Wall. 623) and other cases. We assume there is some agency in your department authorized to deal with claims of this character and we are therefore forwarding the claim to you rather than proceeding directly in the Court of Claims."

In response to suggestions from this Board that the claim had not been presented within the time limit fixed in the act of March 2, 1919, petitioner's counsel, under date of December 3, 1919, wrote this Board as follows:

"We have your letter of November 21st in reference to claim No. 1713 of the Lewis Manufacturing Company, of Walpole, Mass., in which you request us to make proof that this claim was filed before some board in the War Department prior to June 30, 1919. We regret that we can not comply with your request because the fact is that this claim was not filed before anybody until July 29, 1919.

* * * * *

"This is not a claim under the Dent Act and it is not a claim founded on any alleged agreement. It is a claim based on the rule which we understand to be laid down in *United States versus Russell* (13 Wall. 623), to the effect that when the Government requires a citizen to hold his property at the Government's disposal, the Government thereby becomes liable for the damage suffered by the owner in complying with this order whether the Government made any agreement to pay this damage or not. This being the basis of our claim, we can not see that it is either helped or hindered by the Dent Act and we can not see that it makes any difference whether the claim was presented before June 30th or afterwards."

This claim is based upon the following allegations:

1. That on May 2, 1918, the petitioner possessed 89 bales of high-grade cotton linters which had cost petitioner 11½ cents per pound; that on that date the War Industries Board in a circular addressed to manufacturers of cotton linters stated that the Price Fixing Committee of the War Industries Board had determined upon a price of \$4.67 per hundred pounds on all cotton linters then in the hands of producers, dealers, warehousemen, and others except those manufacturing explosives, which bulletin contained the statement that "in the meantime you should make no contracts or sales of cotton linters, except to the authorized agencies of the Government buying linters for explosive or nitration purposes, without notifying and having the consent of the War Industries Board"; that on May 27, 1918, the War Industries Board issued another bulletin to dealers in and users of cotton linters stating that a price had been fixed and stating further that it was imperative that all existing stocks and future production of linters be requisitioned and that all linters that had not voluntarily been tendered the Government at the price fixed for munition

linters, would be commandeered as actual needs develop, and that the commandeering process would give ample opportunity to the owners of special high-grade linters to establish the nature of their product in each individual case; that on July 10, 1918, the War Industries Board issued another bulletin to manufacturers of and dealers in and users of cotton linters stating that it had been deemed necessary for the Government to take over all cotton linters irrespective of grade at the actual value of the commodity, stating that certain suggested prices had been determined upon at which the Dupont American Industries Co. (Inc.), as purchasing agents of the Government, were authorized to buy linters of higher grades than munition linters, which prices were stated to be suggestive only and not obligatory, the suggested prices of linters being: A grade, 10 cents per pound; B grade, 7 cents per pound; that the petitioner's linters then on hand had cost $11\frac{1}{2}$ cents per pound; that as the situation existed on July 20, 1918, the Lewis Manufacturing Co. had the choice either of selling its linters to the Dupont American Industries (Inc.) at the price suggested by the War Industries Board, or of holding them awaiting the commandeering process; that the market elsewhere was closed; that on or about June 15, 1918, but for the "orders" of the War Industries Board petitioner could have sold all its linters at 12 cents per pound; that on November 12, the War Industries Board issued a bulletin removing all restrictions upon the sale of cotton linters, but stated that sales at the suggested prices might still be made to the Dupont American Industries (Inc.) up to the 23d of November; that on September 19 petitioner requested permission of the War Industries Board to sell linters in the open market or for authorization to the Dupont company to pay a higher price for linters than the prices suggested, which request, it is alleged, was refused; that on November 2, 1918, the Ordnance Department began the commandeering process of linters, but did not reach petitioner's linters before the armistice was signed; that after the signing of the armistice petitioner disposed of its linters in the open market at a loss of $6\frac{1}{2}$ cents per pound, thereby incurring a loss of $5\frac{1}{2}$ cents per pound, representing the difference between what it might have received but for the order of the War Industries Board and the price which it did receive of $6\frac{1}{2}$ cents per pound, together with storage charges upon the linters during the time they were held awaiting the commandeering process.

DECISION.

1. The gist of petitioner's claim is that the action of the War Industries Board compelled petitioner either to sell its linters to the Dupont American Industries (Inc.), (the Government's purchasing agent) at a price which was lower than the cost of the linters

to petitioner, or to hold them to await the commandeering process, and that petitioner having held them awaiting the commandeering process, and they were not commandeered, and having been compelled to sell them at a price lower than that at which they could have been sold but for the action of the War Industries Board, the Government of the United States is liable for the loss occasioned thereby, both in the lesser price received and in the storage charges incurred.

2. Has the Secretary of War power to adjust the claim here presented, even if we assume that the action of the War Industries Board, acting on behalf of the Ordnance Department, constituted an implied agreement to reimburse petitioner for the loss incurred in the manner above set out? We are clearly of the opinion that the Secretary of War has no such power.

3. It is admitted that this claim does not come within the purview of the act of March 2, 1919, because it was not presented within the time limit fixed by that act.

4. In the absence of the act of March 2, 1919 (commonly called the Dent Act), it may be generally said that the power of the Secretary of War to settle or adjust claims against the War Department is limited to two general classes of cases: (a) Those cases which arise upon contracts of the War Department executed in the manner prescribed by the Revised Statutes or in the manner authorized by some exception thereto; or (b) to recommending to the Treasury Department payment upon the basis of quantum meruit or quantum valebat, for necessary goods and services actually received and accepted by the War Department.

5. There was, of course, no contract executed in the manner prescribed by law, and no facts to justify bringing the claim within any exception authorized by the Compiled Statutes, so that any adjustment of this matter by the Secretary of War under classification (a) above of his general powers is out of the question.

6. Nor can it be contended that there has been any actual delivery by the petitioner to the Government of the United States of the linters involved in this case. The most that can be said of the bulletins that went out from the War Industries Board to petitioner is that petitioner was given a choice either of selling its linters to the Government at the price the Government offered or of holding them subject to commandeering process, if the Government should desire to commandeer them. In a legal sense, petitioner had a perfect right to dispose of these linters at any time, provided it could find a market for them. The bulletins of the War Industries Board constituted nothing more than a campaign leveled at inducing petitioner and other linter owners to dispose of their property to the Government

at the price suggested or offered. Petitioner declined to sell at the price offered, especially inasmuch as the Government agent's inspector placed petitioner's linters in Class B at a price of 7 cents per pound. Petitioner thereupon decided to hold them until the Government should commandeer them, at which time, and under the provisions of the law authorizing the commandeering process, petitioner could and would have secured a fair value for its property. The Government was under no obligation to commandeer them, petitioner was under no obligation to hold them to be commandeered. There was, therefore, no delivery of these linters to, or acceptance by, the United States, which would in anywise authorize the Secretary of War to make payment for them upon a quantum meruit, and certainly the action of the War Industries Board created no agreement or obligation upon the part of the Government which the Secretary of War, under the circumstances of this case, would have any right to pay or discharge.

7. We have examined with great care the decision of the Supreme Court of the United States in the case of *United States v. Russell* (13 Wall. 623), which has been cited and is relied upon by petitioner as a basis for recovery in this case. In the Russell case, plaintiff's steamboats, which had theretofore been engaged in private business, were in time of military necessity during the Civil War used by the Government upon the orders of the Assistant Quartermaster of the Army for the transportation of troops and supplies, and under such circumstances as to create an implied promise upon the part of the Government to reimburse plaintiff for the services rendered. The boats were actually taken over and used by the Government and valuable services were rendered. The actual taking over and use of the plaintiff's property by the Government distinguishes the Russell case from the claim here presented by petitioner; and the Russell case furnishes no guide or precedent for the assumption by the Secretary of War of jurisdiction to grant any relief in the case here presented.

8. There are other grounds upon which it is apparent that, in the circumstances of this case, the Secretary of War would have no jurisdiction to adjust the claim here presented, which are not necessary now to be discussed.

9. For the reasons above stated, all relief asked for in this case must be denied.

DISPOSITION.

An order will be entered by this Board denying relief.
Col. Delafield and Maj. Farr concurring.

Case No. 2230.

In re CLAIM OF PAHL-HOYT CO.

1. **MUTUAL MISTAKE—RE-FORMATION.**—Where there was a mutual mistake of law in drafting a supplemental contract in settlement of a formal contract, with the result that a proper item of claim was omitted, claimant is entitled to a re-formation of the supplemental contract.
2. **SAME—JURISDICTION.**—The Secretary of War and this Board as his agent have jurisdiction to re-form a contract in a clear case of mutual mistake, because in such a case it is a part of the contracting power of the Secretary of War to restate or re-form the first effort at reducing an agreement to writing in order to get a correct statement of the contract.
3. **CLAIM AND DECISION.**—Appeal under General Order 103 from the decision of the Claims Board, Director of Purchase, on a claim arising out of a formally executed contract for woolen coats. Held, claimant is entitled to relief through a re-formation of the settlement contract.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from the decision of the Claims Board, Director of Purchase, on a claim for \$2,368 on a formally executed contract under the following circumstances:

2. During the summer of 1918, claimant, Pahl-Hoyt Co., was engaged under a formal contract upon the manufacture of woolen service coats for the United States Government, contract No. 2217-N.

3. In the latter part of July the contract No. 2217-N was nearing completion, and Mr. Hoyt, a member of the claimant firm, called upon Mr. Wells, Acting Chief of the Uniform Section, Clothing and Equipage Division of the Quartermaster Department, located in New York City. In the conversation Mr. Wells told Mr. Hoyt that a new contract for 30,000 wool service coats was being issued to them, but that the papers had not arrived; that he, Mr. Wells, would get the new contract number for the Pahl-Hoyt Co. and let them know in a few days what it was; that the department was in urgent

need of particular sizes, and that he did not want the operations to stop for a minute. (Tr., p. 17.)

4. Mr. Wells, in his affidavit, substantiates the testimony of Mr. Hoyt in that he told him that recommendation had been made for 30,000 wool service coats. This recommendation was issued to said company by his division in the latter part of July or the 1st of August, 1918.

5. Upon the authorization of the conversation between Mr. Hoyt and Mr. Wells, claimant company, on August 6, 7, and 9, had delivered to them 12,800 canvas fronts for wool service coats, for which they paid the sum of \$2,368.

6. On August 30, 1918, recommendation for purchase was issued from the Manufacturing Branch to the Purchasing and Contracting Branch, Authorization No. RQ1340, No. MC1649, (1) contractor's name Pahl-Hoyt; (2) articles, woolen coats; (3) quantity, 30,000; (9) specifications, 1285.

7. Between August 30 and September 10 a change was made in the specifications, and Specifications No. 1356 were substituted for and in place of Specifications No. 1285.

8. On September 10, 1918, claimant company entered into a formally executed contract, No. 6216-N, with a duly authorized contracting officer of the Quartermaster Corps for the delivery of 30,000 wool service coats. Paragraph (1) of said contract provides as follows:

"1. *Subject of contract.*—The contractor shall, subject to the provisions of this contract, furnish and deliver articles (herein called 'articles'), like and equal in all respects to the standard sample on file in the office of New York D. Q. M. of the description and in accordance with the specifications and in the quantity, at the price (herein called 'contract price'), at the place or places, at the time or times, and out of the materials furnished by the contracting officer, as set forth in Schedule 'A' attached hereto, signed by the parties hereto, and made a part hereof."

9. When the contract was received, two schedules marked "Schedule A" were attached to said contract. Paragraph (13) in one provides as follows:

"Specifications: # 1285, hereto annexed and made a part hereof, and as per three similar samples to be submitted to and approved by the Clothing & Equipage Division."

Paragraph (13) in the other provides as follows:

"Specifications: #1356, hereto annexed and made a part hereof, and as per three similar samples to be submitted to and approved by the Clothing & Equipage Division, 109 East 16th Street, New York, N. Y."

10. Specifications No. 1285 provided as follows:

" Gov't furnishes—Melton 54".
 " " L. W. serge.
 " " Silesia.
 " " Duck.
 " " Felt.
 " " Buttons 36/
 " " Buttons 24/
 " Contractor furnishes—Tape.
 " " Buckram.
 " " Thread.
 " " Canvas.
 " " Cotton wadding.
 " " Shoulder pads.
 " " Hooks & eyes.
 " " Gimp."

11. Specifications No. 1356 provided as follows:

" *20 oz. olive drab melton (cloth specifications, 1316).
 *Olive drab cotton cloth.
 *Olive drab silesia.
 *Canvas padding.
 *O. D. tape, stay tape buckram.
 *Nickeled brass hooks and eyes.
 *Bronze buttons, large and small.
 Mercerized cotton letter 'A' 3-cord having a tensile
 strength of 6½ lbs.
 'O' mercerized cotton.
 O. D. linen thread No. 35.
 O. D. cotton thread No. 20.
 O. D. cotton gimp No. 8.
 *Government furnishes.

12. After the signing of the armistice the formal contract No. 6216-N was suspended, and claimant furnished to the Claims Board, Director of Purchase, an inventory and questionnaire as required by that Board, which inventory was verified by Abraham Freidell, Government inspector, and which inventory, on page 3, under the heading of "Materials on hand purchased by contractor for this contract," shows the following:

	Quantity.	Purchased from whom?	Date of invoice.	Total cost to contractor.
Canvas.....	12,500	Custom-made coat, Front & Pad Co...	8/7-9-18	\$2,312.50

13. A copy of said inventory marked "A true copy and verified, signed Abraham Freidell, Gov. Inspector," was sent to the Claims Board, Director of Purchase, but the item for canvas coat fronts was omitted therefrom.

14. When this omission was called to the attention of Inspector Freidell and he was asked about the same, he replied that it was omitted under instructions of Nathan Wolff (his superior in the office of the depot quartermaster, New York). (Testimony of Maj. Dempsey, p. 81, Tr.)

15. Thereafter, under date of January 28, 1919, claimant company entered into and executed an agreement of settlement on contract No. 6216-N, whereby it agreed to accept the terms offered by the Government, and in consideration of the sum of \$2,455.94 waived all claims of whatsoever nature that they might have had against the Government. Claimant was paid under this settlement contract the sum of \$2,455.94.

16. Prior to entering into the settlement contract as above, the claimant company took up the matter with the Claims Board, and was informed by them that they had no authority to settle for the canvas coat fronts because the specifications had been changed, and they were settling under the contract as issued with Specifications No. 1356, "New model coats."

17. Mr. Frederick C. Wightman, chairman of the Board of Contract Adjustment, Clothing and Equipage Division, New York, in his affidavit, testified as follows:

"In the adjustment of *this* contract the Board could not consider the item of canvas coat fronts for the reason that *this* contract did not require this article to be used in the manufacture of this model of wool service coat. I recall Mr. Hoyt mentioning the subject of these canvas fronts as being purchased for the original contract for old model coat, and he considered that he should have some adjustment for the extra expense he had gone to in the purchase of these fronts. He was informed that these canvas fronts could not be considered in the adjustment of the formal contract. He accepted our adjustment and signed a release under date of January 28, 1919, which read: 'In consideration of this sum we hereby waive all claims of whatsoever nature that we may have against the Government.'

"The Board, in considering this claim of Mr. Hoyt, could not allow the claim which he said was due him for the purchase of these fronts, as our authority would not sanction reimbursing him for any other items except those listed as per the schedule supplied by the C. & E. Division, Washington, which allowed the contractors who were manufacturing new model coats, Specification 1356, for an adjustment on thread of 60 per cent of the cost price, and an adjustment of 99 per cent of the cost price on labels.

"It was considered by the Board that possibly the claimant might have a valid claim for the canvas coat fronts, but in the shape in which the claim was presented, being a settlement of a formal contract for new model coats, not calling for canvas fronts, we felt we could not consider it and so advised him. The release dated January 28, 1919, as I now recall it, was understood to include *only* the claims of the Pahl-Hoyt Company growing out of this formal contract, leaving the canvas coat question open."

18. It will be noted in paragraph (2) of the above quotation that Mr. Wightman speaks of the schedule supplied by the C. & E. Division, Washington. This schedule is the schedule furnished by contractor and verified by Inspector Freidell, the original copy of which was not sent to Washington, but a copy eliminating the canvas coat fronts was sent.

DECISION.

1. In the case at bar the contract was settled and a formally executed settlement contract was entered into between the claimant and the Government in the usual form, containing a general release of all claims by the contractor.

2. The question, therefore, before this Board is as to whether or not this amendatory settlement or termination of an agreement having been executed by both the claimant and the Secretary of War, the Secretary of War has lost power to further re-form this settlement contract.

3. The re-formation on the ground of a mutual mistake of a written contract solemnly entered into should be undertaken only upon the clearest evidence that such a mistake exists. (U. S. v. Milliken, 202 U. S. 168.)

4. In the instant case the original inventory prepared by claimant and submitted included the cost of the canvas coat fronts, the value of which is the subject of this claim. Through a mistaken idea of the law the inventory forwarded to the Claims Board, Director of Purchase, by the Government inspector, omitted the item of canvas coat fronts.

5. In the settlement of claims before the Claims Board, Director of Purchase, the chairman of the Board, through a mistaken idea of the power of the Board, mistake of law, stated to Mr. Hoyt, of claimant company, that they could not take up the claim for the canvas coat front for the reason that the specifications had been changed, and they could only settle on the contract as it then appeared. The original specifications, No. 1285, contained the item of canvas coat fronts, while Specifications No. 1356, which were the final specifications, made a part of the original contract and the specifications that the Claims Board were considering as the only specifications applicable to the contract then before it, omitted this item of canvas coat fronts. This statement of the chairman of the Board was accepted by claimant company as a true statement of the law, and it therefore did not insist upon a settlement of the item for canvas coat fronts at the same time the balance of the settlement on the contract was made.

6. The mistake in the instant case arose from the belief of both parties that the item of canvas coat fronts would have to be taken up and settled in a separate and distinct settlement contract.

7. It was the intention of both parties at the time the settlement contract was entered into that it should not bar the claimant from any claim he might have for the purchase of canvas coat fronts, the value of which is claimed in the present case.

8. We are satisfied that the written agreement of settlement herein does not express the intent of the parties in that it does not cover the reimbursement for all of the materials purchased for the execution of this contract, i. e., these canvas coat fronts, and that this was due to a mistake such that the claimant would be entitled in a court of equity to re-formation of its contract so as to include payment for the canvas coat fronts to which, in the opinion of this Board, claimant is entitled under the terms of the original contract and Specifications No. 1285, which at the time of entering into said original contract were a part thereof.

9. The Board of Contract Adjustment is not, however, a court of equity. It exercises only certain powers granted by Congress to the Secretary of War and by him delegated to the Board. The question, therefore, is whether the Secretary can by agreement with the contractor exercise the right of re-forming a contract entered into by him through his agents where the circumstances are such that a court of equity would require re-formation in a case properly brought before it.

10. The act of re-forming a contract is not, accurately speaking, an amendment thereof, although it may be that it can be carried into effect only by a document having the form of an amendment. It is, in fact, merely the proper performance of a ministerial duty—that is, the reducing of an agreement to writing. We believe that the Secretary, and therefore this Board as his agent, has the right to redraft the contract between the Government and the claimant so that it shall recite the agreement as made.

11. Clearly a mistake was made on the part of both parties herein, and as was said by Col. John R. Delafield in his Memorandum on the Re-formation of War Department Contracts by Agreement, dated January 17, 1920:

“The law would seem clearly to be that re-formation goes on the basis merely of an endeavor by mutual consent to clearly and correctly state the agreement made as of the date when it was intended to reduce it to writing. It may be said that until the Secretary of War and the claimant have succeeded in so reducing it to writing, they have never actually made the contract in written form. It, therefore, clearly remains a part of the function of the Secretary of War to restate or re-form the first effort at reducing the agreement to writing, and it remains his function to do so as many times as may be necessary in order to get a correct statement.”

12. The Board is, therefore, of the opinion that the settlement contract entered into between the United States Government and the claimant should be re-formed so as to include the value of the canvas-coat fronts purchased for the performance of the original contract, and settlement should be made with claimant for the value thereof.

13. This Board will, therefore, refer the matter to the Claims Board, Director of Purchase, for amendment of the original settlement contract by a supplemental settlement contract re-forming the one heretofore made, so that it will include the item for the canvas-coat fronts, for determination of the proper amount due, and for final settlement of the account between claimant and the Government.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Director of Purchase, for action in accordance herewith.

Col. Delafield and Mr. Montgomery concurring.

Case No. 2341.

In re CLAIM OF DOUBLEDAY-HUNT-DOLAN CO.

1. **ORAL ORDER BY DRAFT EXEMPTION BOARD.**—Where office supplies were orally ordered by a district exemption board and used by the board in the performance of its duties, there was an agreement within the purview of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral contract for office supplies. Held, claimant is entitled to relief.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This case comes to the Board of Contract Adjustment by reference of the Classification Claims Board, Settlements Division, Director of Finance, Washington, D. C. It is a Class B claim for \$259 for filing cases and office supplies, alleged to have been furnished the district exemption board for division No. 2, western district of Michigan.

2. On the oral orders of Parm C. Gilbert, Traverse City, Mich., a member of said exemption board, given on August 16 and August 20, 1917, the claimant delivered to said board certain filing cases, minute record sheets, loose-leaf binders, filing jackets, and other office supplies, no understanding having been arrived at as to what the price for same should be. At the time of such delivery and acceptance of the goods, claimant billed the goods at the same price charged other district exemption boards, which price was not complained of by any other of said boards as unreasonable. District board No. 2 refused to approve the bill on the ground that the prices were excessive and subsequently disbanded, leaving this bill unpaid.

3. The bill showing the items of the order and the prices which were claimed to be excessive is as follows:

1917.	
Aug. 16. 24 filing cases with guide cards, at \$3.25.....	\$78. 00
Minute record sheets for 6,000 claims.....	37. 50
24 loose-leaf binders for sheets with index, at \$3.25..	78. 00
3,000 filing jackets for filing paper, at \$1.50 per C....	45. 00
	<hr/>
	\$238. 50
Aug. 20. 2 loose-leaf binders with indexes.....	6. 50
2 file cases for draft board files and 2 sets guide cards,	
at \$3.25	6. 50
500 filing jackets for documents, printed.....	7. 50
	<hr/>
	20. 50
	<hr/>
	259. 00

4. It appears from the affidavit of Parm C. Gilbert that the goods mentioned were received by the district board in August, 1917; that there was no price agreed upon; that the property was needed for immediate use and was promptly furnished by claimant and was used by the Government in the hands of the district board during the greater portion of the time that said board was engaged in its duties in connection with the draft and dealing with exemption claims. And it appears from the uncontroverted statement of the claimant that the prices charged therefor are reasonable and are the same prices charged other similar boards in Michigan, who found no fault with the prices or the goods; that the board in question was in immediate need of these supplies and claimant hurried them out to the board without written contract because of such pressing need.

DECISION.

1. In view of the foregoing facts and of the further fact that the claimant has carried this account since August, 1917, it is the decision of this Board that an informal agreement within the meaning of the so-called Dent Act exists between claimant and the Government for the items named in paragraph 3 of the findings of fact, and the claimant is entitled to fair and reasonable compensation therefor, which is hereby fixed at the prices named in said paragraph.

DISPOSITION.

This Board will make a statement of the nature, terms, and conditions of the agreement and Certificate Form C, as provided in Supply Circular No. 17, revised, and will formulate an award in the amount of \$259 and transmit the same to the appropriate finance officer, to be paid to the claimant herein mentioned.

Col. Delafield and Mr. Shaw concurring.

Case No. 2425.

In re CLAIM OF HUTTIG SASH & DOOR CO.

1. **CLAIM UNDER GENERAL ORDER 103—RESUMPTION OF FORMAL CONTRACT.**—Where the Government has a suspended formal contract with a manufacturer, and intends to direct the resumption of manufacture thereunder, but by mistake sends the telegram directing the resumption to claimant, who has no contract, who manufactures the articles and ships them (according to directions addressed to the contractor, but inclosed in an envelope directed to and received by claimant), there is no resumption of the formal contract.
2. **ACT OF MARCH 2, 1919—JURISDICTION.**—Under the above circumstances when the telegram is dated subsequent to November 12, 1918, there is no claim for adjustment within the meaning of the act of March 2, 1919, since this act authorizes only the adjustment of contracts "entered into during the present emergency and prior to November 12, 1918."
3. **SALES—MISTAKE IN PARTIES—PRIVITY OF CONTRACT.**—Where goods are ordered of one person and supplied by another, the acceptance and use by the person ordering them without notice that they have not been supplied by the one of whom they were ordered creates no privity of contract between the person ordering the goods and the person supplying them.
4. **QUANTUM MERUIT.**—Where under the above circumstances the goods ordered are not accepted, there can be no settlement on a quantum meruit basis.
5. **CLAIM AND DECISION.**—Claim under General Order 103, for sash slides manufactured and shipped under telegram received by claimant, but intended for another. Held, claimant is not entitled to an adjustment.

Maj. O'Neill writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Orders, No. 103, War Department, 1918, and is for \$29.18, under the following circumstances:

2. On February 19, 1919, the Chief of Construction telegraphed claimant, Huttig Sash & Door Co., of St. Louis, Mo., as follows:

"Referring to Requisition one, Bureau Order five eleven, mill work for Leavenworth, *resume* manufacture immediately but hold for further shipping instructions one hundred fifty sash slides eighteen five-eighths by two and five-eighths—five naught. Balance of order remains suspended. Wire acknowledgment. Letter follows."

3. The above message was confirmed by letter of the same date and properly directed to the claimant at his correct business address in St. Louis.

4. The claimant, Huttig Sash & Door Co., of St. Louis, Mo., did not have a suspended contract, or for that matter any contract with the Construction Division, but the Huttig Mill Work Co., of Kansas City, Mo., did have such a contract, and the telegram and letter were sent to the claimant through error.

5. Shipping instructions were issued under date of February 17, 1919, and while the envelope was addressed to claimant, the inclosure was directed to the Huttig Mills Works, of Kansas City, Mo.

6. The supplies were manufactured and shipped on April 21, 1919, to the place designated in the instructions, which were erroneously inclosed in an envelope directed to claimant, but were refused by the Government at destination, and later, after due notice to the claimant, were sold by the carrier for storage charges.

DECISION.

1. This claim is improperly classified as a General Order 103 claim, as the facts set forth above do not constitute a contract within the meaning of section 3744, United States Revised Statutes, or the exceptions thereto.

2. The telegram to claimant instructing it to *resume* production and shipping instructions issued later do not constitute a contract.

" * * * Where goods ordered of one person are supplied by another the acceptance and use of the goods without notice that have been supplied will not create a privity of contract between the person ordering the goods and the person supplying them * * *." (*Barnes v. Shoemaker*, 112 Ind. 512; 14 N. E. 367.)

3. The claimant is not entitled to a settlement on the basis of quantum valebat, since the goods were refused by the Government.

4. The claim can not be adjusted under the act of March 2, 1919, known as the Dent Act, since this act only authorizes the adjustment of contracts "entered into during the present emergency and prior to November 12, 1918."

DISPOSITION.

1. This Board will disallow the claim in accordance with this decision and transmit the same to the Board of Contract Review and Claims Board of the Construction Division of the Army for appropriate action.

Col. Delafield and Mr. Low concurring.

Case No. 2064.

In re **CLAIM OF ANGELICA JACKET CO.**

1. **FACILITIES.**—No agreement to reimburse a contractor for machinery and equipment is to be implied from a representation of Government needs, followed by a request to hasten production under an existing contract and submit bids for another contract.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied agreement to reimburse claimant for machinery and equipment. Held, claimant is not entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919, statement of claim, Form B, having been filed under Purchase, Storage and Traffic Division, Supply Circular No. 17, the amount involved being \$1,802.45 for alleged expenditures in providing facilities and machinery for the manufacture of white duck coats and trousers under an alleged agreement between claimant and officers and agents acting under the authority, direction, and instruction of the Secretary of War.

2. Claimant alleges that in the early part of the summer of 1918, Mr. M. M. Levy, secretary and treasurer of the Angelica Jacket Co. (the claimant) was in New York; that the said M. M. Levy was secretary of an organization known as the White Duck Clothing Manufacturers; that while in New York he talked with various civilian employees of the Light Goods Section, Office of the Quartermaster General, New York City; was told that the Government was hard pressed for white duck coats and pants for hospital use, and in his capacity of secretary of the foregoing manufacturers' organization furnished said Government employees with the names of manufacturers in that line who might be able to supply the Government, but did not include in such list the name of the Angelica Jacket Co., because at that time the Angelica Jacket Co. were filled up with orders and did not care to engage in Government work.

3. That it was represented to claimant at that time that the needs of the Government were far beyond the production and that it was

the duty of the claimant to undertake Government work, and that claimant should enlarge its capacity in contemplation of orders which would unquestionably follow.

4. Shortly after this conversation, namely, on or about July 19, 1918, the claimant began to order machinery and other equipment in order to enlarge its capacity, and under date of July 27, 1918, received a contract, No. 4873-S, from the Government, which was fully performed; in fact, the last deliveries were made in the latter part of October, 1918, in advance of the time provided.

5. On October 7, 1918, while contract No. 4873-S was in course of manufacture, claimant was requested by Capt. Mannigan, Quartermaster Corps, assistant to depot quartermaster, St. Louis, to increase production (see claimant's Exhibit No. 2, p. 21, Transcript), the letter reading as follows:

"1. It is requested that you increase your production to the extent that your contract will be completed before the specified time. These garments are urgently needed, and it is very important that every effort is made on your part and the part of your employees, so that contract will have a clean record.

"2. You will kindly notify this office when you will have this contract completed and also advise each week what your increased production will be. Do not estimate, but give exact figures."

6. On September 6 or 10, 1918, claimant received an invitation to bid on a contract for 200,000 white duck coats and 200,000 white duck pants.

7. Bids were submitted and claimant was recommended by the officers of the Government for an award (see letter Capt. Mannigan Oct. 24, 1918, p. 32, Transcript), and on October 30, 1918, claimant was advised that formal papers in contract would be sent within a few days (see letter Oct. 30, p. 36, Transcript), and on November 13, 1918, a formal contract, No. 7570-S, was forwarded to the claimant for execution.

8. Nothing, however, was done under this contract, the same being suspended owing to the armistice.

9. No claim is made for any expenditures on thread, material, or labor in preparing to perform this contract, the instant claim being solely for losses alleged to have been incurred by reason of providing machinery and equipment during June, July, August, September, and October, 1918, to increase plant facilities under an alleged agreement.

DECISION.

1. Under the act of March 2, 1919, an agreement may be either express or implied.

2. No express agreement is alleged and absolutely none is proven.

3. It is attempted to establish an implied agreement from the conversation held in New York in June, supplemented by the claimant's knowledge of the Government's needs as communicated to it by the fact of a contract having been awarded July 27, 1918; by claimant being requested to bid on 200,000 coats and 200,000 trousers on September 6 or 10, 1918; by claimant being urged on October 7, 1918, to hasten its production on the contract then in course of performance.

4. Not a single definite statement or promise is alleged to have been made during the conversation in New York in June. The testimony of Oliver S. J. Rice, office manager, Light Goods Section, who was present during said conversation, shows that the conversation was a very general one:

"Q. You were acquainted with the Angelica Jacket Co. in a general way, were you not? You know their reputation?

"A. In a business way.

"Q. I notice in the second paragraph of that letter you state 'due to the high character of merchandise this firm produced, we influenced them, in view of the increasing delinquency, to prepare to produce coats and trousers in equal quantities for the Quartermaster Corps of the United States Army.'

"Now, will you kindly elaborate and tell us more, if you can, as to what was said down there to have them prepare to produce increased facilities?

"Lieut. Col. McKEEBY. If you are referring to any particular conversation, you should lay a foundation in a regular legal way.

"Q. (to witness) Did you have any personal conversation with any of the officers of the Angelica Jacket Co. with reference to their preparing to increase their facilities for coats?

"A. Not directly with any particular member of the Angelica Jacket Co. as a member of the Angelica Jacket Co.

"Q. What do you mean by the statement 'as a member of the Angelica Jacket Co.?'

"A. If I remember correctly, when the members of the Angelica Jacket Co. were present there were some manufacturing associations present, and I believe at the time he was in New York there was some statement made relative to what the Government needs would be on white duck clothing. When I say 'influenced' I will define that to this extent and modify it to say that that influence went so far as to suggest that these association members be prepared to take care of the Government requirements, arrange their business accordingly.

"Q. Who had this conversation with Mr. Levy?

"A. I could not say that any particular member had this conversation. It was just a friendly talk. When I say 'a friendly talk'—they had to be friendly with these associations to get production.

"Q. It was just a general conversation that was held down there?

"A. A general conversation." (See pp. 55, 56, 57, 58, Transcript.)

5. The affidavit of M. M. Levy, secretary and treasurer of the Angelica Jacket Co. (see claimant's Exhibit No. 1, p. 12, Transcript),

and the testimony of the Government representative establish beyond a doubt the fact that the said conversation was general, and was without intent to contract for any additional equipment or machinery.

6. The invitation for bids of September 6 or 10, 1918, the recommendation for an award made by John Wiechers, in charge of procurement, white duck and orderly suits, Clothing and Equipage Division, is explained in his affidavit, Government Exhibit No. 9:

"In September, 1918, pursuant to requisition then in, new bids were asked on these garments from various concerns throughout the United States. Bids were entirely voluntary on the part of the different manufacturers, who handed in proposals. In no case was pressure brought to bear on any concern to make a bid. After careful consideration of all bids, it was recommended by the writer that the Angelica Jacket Co. be awarded a contract for weekly production of 1,000 coats and 1,000 trousers to extend over the period of 12 weeks. This recommendation was made on the strength of reports, both by the subject concern itself and Government investigators that such firm could handle this contract without any additions to their plant or extra expenditures for the purchase of machinery on their part."

7. In affidavit of A. M. Wolf, a Government employee (see Government Exhibit No. 12), the deponent avers:

"As far as I am concerned, they were never authorized to purchase additional machinery for the purpose of filling Government contracts."

8. No agreement to pay claimant for expenditures made for machinery or equipment can be implied from the letter of Capt. Mannigan of October 30, 1918, for until the receipt of that letter claimant had no promise of an award and the expenditures made and obligations incurred for the additional machinery and equipment were made prior to that date, and no expenditures were made or obligations incurred upon the faith of any agreement which may have arisen out of said letter of October 30, 1918.

The act of March 2, 1919, provides:

"That the Secretary of War be, and is hereby, authorized to adjust, pay or discharge any agreement, either express or implied, * * * when expenditures have been made or obligations have been incurred upon the faith of same prior to November 12, 1918."

The Court of Claims has held:

"Implied contracts in fact do not arise from demands and contentions of parties, but from the common understanding in the ordinary course of business, whereby mutual intent to contract without formal words therefor is shown." (*Knapp v. U. S.*, 46 Ct. Cls. 601.)

9. In order to bind the Government under an implied contract to pay for such machinery and equipment, the facts and circum-

stances laying the obligation upon the Government must be clear, definite, and precise.

10. No agreement, either express or implied, having been entered into for the purchase of machinery or equipment, claimant's petition for relief must be denied.

DISPOSITION.

1. A final order denying relief will issue.
Col. Delafield and Mr. Averill concurring.

Case No. 471.

In re CLAIM OF HIGH CLOTHING CO. (INC.).

1. **JURISDICTION.**—The Board of Contract Adjustment has no jurisdiction to grant relief to claimant for damages growing out of a formal contract fully performed.
2. **ANTICIPATED CONTRACT.**—Where claimant kept its factory idle while waiting to perform future Government contracts it is not entitled, under the act of March 2, 1919, to reimbursement of loss thereby sustained in the absence of evidence showing that it was promised or given such future contracts.
3. **CLAIM AND DECISION.**—This claim arises under the act of March 2, 1919, upon the theory that claimant sustained a loss by waiting for material to perform a formal contract and by holding its factory in idleness for the purpose of performing future contracts. Held, that the Board of Contract Adjustment has no jurisdiction to grant relief growing out of formal contracts fully performed and that the evidence is insufficient to show that claimant was promised or given any future contracts.

Mr. Harding writing the opinion of the Board.

This claim was transmitted to this Board by the Claims Board, Director of Purchase, who denied the claim. The claim arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$27,793, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Claimant had a formal contract with the Government, No. 2135, dated September 12, 1917, and expiring by its terms December 29, 1917, for the manufacture of 65,000 cotton breeches, for which the Government was to furnish and did furnish the materials. The manufacture and delivery were not completed by the claimant until near the end of July, 1918.

The claimant also had a formal contract, No. 4156-N, dated June 29, 1918, and expiring by its terms August 27, 1918, for the manufacture of 18,000 pairs of similar cotton breeches, delivery 3,000 per week, for which the Government was to furnish and did furnish the materials. The manufacture and delivery of the goods were not completed until near the end of November, 1918 (p. 49, Record).

The claimant alleges that it was offered other and additional contracts during the autumn of 1918, which were never executed and upon the performance of which it had never entered.

2. Claimant presents a claim for damages by reason of actions to its detriment by the Government between May 1, 1918, and November 12, 1918, as follows:

(a) 22 weeks idle labor, at \$350 per week-----	\$7, 700. 00
(b) 22 weeks paid wages to idle labor, at approximately \$125 per week-----	2, 550. 00
(c) Purchase of 32 special machines-----	4, 343. 00
(d) 22 weeks' profit lost on average output of 3,000 pairs per week, a net profit of \$20-----	13, 200. 00
	<hr/> 27, 793. 00

An analysis of the above claim in the light of the evidence shows that to arrive at items (a) and (b) of the claim for idle labor, the 22 weeks are made up as follows:

(1) Idleness of factory on account of lack of material from May 1, 1918, to July 10, 1918, 10 weeks, and idleness for lack of promised contracts from August 20, 1918, to November 12, 1918, 12 weeks; total, 22 weeks.

In the interval of time between July 10, 1918, and August 20, 1918, the claimant's factory was suffering from a strike, or partial strike, and the resulting idleness of its factory during this period is not charged against the Government.

(2) Item (c) of \$4,343, a charge which the claimant makes for special machinery, is shown by the evidence to be for machinery purchased both for use in the formal contracts set forth in item 1 of these findings of fact, and, as the claimant alleges, partially for machinery purchased for the performance of the expected contracts. It appears in the claimant's own statement submitted with its affidavit after the hearing and sworn to on February 2, 1920, giving a list of all of the machines and placing their figures at \$4,438.25, as follows:

"The above machines were bought special for the prosecution of the two contracts, 2135 and 4156-N, during the period of beginning Sept. 12, 1917, and ending Nov. 12, 1918."

Claimant alleges that most of its original invoices have been lost, but submits five of them, dated respectively:

Dec. 22, 1917-----	\$300. 00
Dec. 31, 1917-----	658. 75
June 25, 1918-----	276. 25
July 6, 1918-----	175. 00
Sept. 23, 1918, shipped to claimant Aug. 1, 1918-----	192. 00

During all of the period within which these machines were purchased, either the formal contract No. 2135 or the formal contract 4126-N, above referred to, was in process of being performed, and

at some of the dates of purchase both of them were in process of performance.

(3) Item (d) is for profit which claimant alleges it would have made if its factory had not been idle at the times set forth in items (a) and (b), as analyzed above; for the first 10 weeks, if it had not been delayed on account of lack of material, and during the last 12 weeks, as above analyzed, if it had been given the expected contracts.

3. It appears that a strike, or a partial one, was called in the claimant's factory on or about July 29, 1918. The conditions existing between the officers of the claimant and the labor employed were such that the Government, through the Administration of Labor Standards for Army Clothing, and in the person of Prof. William Z. Ripley, intervened and attempted to settle the labor dispute, as it had the right to do under clause 11 of the formal written contract then in process of performance; and on August 3, 1918, the Administrator, Prof. William Z. Ripley, issued his decision in writing and delivered the same to the claimant and to the office of the Director of Purchase. The decision is as follows:

AUGUST 3, 1918.

DECISION—HIGH CLOTHING CO., 393 HIGH STREET, NEWARK, N. J.

1. It is ordered that all workers employed previous to and on July 29th, not now so employed, shall be reinstated at their former jobs. Of those at present employed who are necessarily displaced, it is directed that preference in continued employment shall be given to those who were so employed previous to July 29. This action is directed without reference in any respect to the particular union to which any worker may belong.

2. It is further ordered that the employer immediately take steps to enter into collective bargaining with his employees after this reinstatement as provided for by the National War Labor Conference Board on March 29, 1918, proclaimed by the President on April 8th, 1918.

3. Should no agreement as to wages be reached between the employer and a committee of his own workers, duly elected by them, the matter of a wage scale will be taken up for official settlement by the Administration of Labor Standards for Army Clothing under the powers delegated to it by the Secretary of War of the United States.

(Signed) WM. Z. RIPLEY,
Administrator.

Later it was found by the Administrator that the claimant had not complied with his decision, and that claimant's officers were not showing any disposition toward compliance, and that the effect thereof was that deliveries to the Government under the contract then being performed were being delayed; and thereupon on August

15, 1918, the Administration of Labor Standards for Army Clothing, through Prof. William Z. Ripley, Administrator, rendered a further decision reciting the decision of August 3, 1918, above set forth, and stating that that decision had not been accepted by the claimant in good faith; that the claimant was continually guilty of deceptive relations with its employees, and that by reason thereof the interest of the Government was being sacrificed, and recommended that no other Government contracts be given to the claimant.

It appears that by the action of the Labor Administration, above set forth, the claimant became incompetent to become a contractor for the Government again until such time as the inhibition might be removed.

4. On September 20, 1918, a meeting was held at the Quartermaster General's Office in Washington for the purpose of considering the relations of the claimant with its labor, and the action of Prof. William Z. Ripley, Administrator, with reference thereto. The conference was informal and the claimant was not present. It was agreed at that conference, in substance, that the inhibition laid upon the claimant with reference to the existing contract, and with reference to again being available for contracts, might be renewed upon Prof. Ripley's recommendation to the Director of Purchase for that purpose. should the claimant give proper assurances to Prof. Ripley, or to the Administration of Labor Standards for Army Clothing, that it would thereafter comply with the rules laid down by that administration.

Benjamin Staw, the president of the claimant, was not at the conference, but was in the building and was informed of the resulting action.

5. On October 1, 1918, H. F. Ford, Assistant Administrator of the Administration of Labor Standards for Army Clothing, addressed a letter to the claimant as follows:

War Department, Office of the Quartermaster General of the Army,
Administration of Labor Standards for Army Clothing, William
Z. Ripley, Administrator.

OCTOBER 1, 1918.

HIGH CLOTHING COMPANY,
393 High Street, Newark, New Jersey.

Attention of Mr. Staw.

DEAR SIR: The other day I met you in the elevator at 109 E. 16th Street, New York City, at which time you stated that Dr. Ripley had reversed his decision regarding the High Clothing Company. I wish to correct your impression regarding Dr. Ripley's actions. Dr. Ripley's action is covered in the following memorandum:

"At a conference in Washington before Maj. Tully it was finally agreed that a bid for a new contract might be entertained upon assur-

ance satisfactory to the Administration of Labor Standards that hereafter its decisions would be faithfully observed in all particulars. Until such satisfactory guarantees are given, further contracts will, however, be withheld."

Under the terms of this memorandum it will be necessary for you to submit to Dr. Ripley assurances that all future decisions will be fully carried out if occasion should arise for such decisions to be given. However, I can not reconcile your statement that Dr. Ripley had reversed his decision rendered under date of August 15, with satisfactory guarantees regarding the future, inasmuch as the statements which you made are not borne out by the facts in the case.

I trust that this will make the situation entirely clear to you.

Very truly, yours,

H. F. FORD, *Asst. Administrator.*

And received thereto the reply of the claimant as follows:

OCTOBER 7, 1918.

Prof. WILLIAM Z. RIPLEY,

*Administrator of Labor Standards for Army Clothing,
109 East 16th St., N. Y. C.*

DEAR PROF. RIPLEY: In reference to the communication which we received from Mr. Ford, I wish to state that it is our purpose fully to carry out the provisions of the contracts and to comply with all the rulings made by the Labor Administrator. It has always been our object to cooperate with the Government, and we desire that every opportunity be given us to do so.

Very truly, yours,

THE HIGH CLOTHING COMPANY,
By _____.

On November 6, 1918, the New York depot of the Quartermaster's Office of the Clothing and Equipage Division addressed a letter to the claimant requiring of it a financial statement, which they required in most cases, and especially in the circumstances in which this claimant was placed, before issuing new contracts.

After the inhibition placed upon the claimant from becoming a new contractor it was necessary, in order that the inhibition be removed, that the Administration of Labor Standards for Army Clothing should notify the Director of Purchase of his findings, or of the fact that the claimant had complied with all requirements for the removal, and then it was within the functions of the Director of Purchase to remove or not remove the inhibition and to grant or not to grant new contracts through his various agencies as might seem to him best.

Harry L. Wells, Chief of the Uniform Branch, Clothing and Equipage Division, states in the records of this case as follows:

"We were instructed by the Bureau of Labor Standards of the Clothing Division of the Army not to negotiate further contracts with the High Clothing Company, unless and until they acquiesced in a ruling of the labor arbitrator in labor difficulties which they had had. There was no encouragement from any officer as far as I know

for this company to keep its orders intact. In fact, when the last bids were submitted prior to the signing of the armistice, this firm was still disapproved for contracts, both by the Bureau of Labor Standards and the New York Zone Supply Office."

It nowhere appears in the record that the inhibition placed upon the claimant by William Z. Ripley, Administrator of the Administration of Labor Standards for Army Clothing, was in fact ever removed.

6. Claimant based its expectation of future contracts or its alleged informal contracts on conversations alleged to have been had with Harry L. Wells, Chief of the Uniform Branch of the Clothing and Equipage Division, on September 23, 1918, and with Bernard F. Tully, assistant to the Chief of the Clothing and Procurement Section, Quartermaster's Department, some time after October 10, 1918, both of whom testified in effect that no contract or promised contract was given to claimant after September 20, 1918; and neither does it appear anywhere in the conversations that any particular contract was entered into by which both parties to it were bound.

DECISION.

It can not be stated too often that under the act of March 2, 1919, this Board has jurisdiction to adjust only agreements, express or implied, not executed according to law, entered into in good faith prior to November 12, 1918, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of it. It appears very clearly (item 1, findings of fact) that from September 12, 1917, until near the end of November, 1918, the claimant was at work continuously on manufacturing cotton breeches on formal contracts. These contracts were both performed, the goods manufactured under them were delivered, and the agreed price was paid for them. This Board has no jurisdiction to deal with these contracts, or to make any allowance thereon on account of unliquidated damages, and therefore all claims made by the claimant on account of them for loss on account of idleness of its factory, or lack of material, or the purchase of machinery, or profits lost, must be and are disposed of against the claimant.

According to the claimant's own contention, there is no claim made on account of promised contracts or on account of an informal contract, except such as may have been entered into after August 20, 1918. Aside from the law of the case and the lack of jurisdiction on the part of this Board to consider the same, the claimant's contention that its factory was idle, or that it lost anything on account of the purchase of machinery, or for lack of material in May, 1918,

is entirely untenable and contradicted by its own testimony, and never should have been made before this Board.

The claimant alleges that its loss of time prior to August 20, 1918, was caused by lack of material which the Government promised to furnish it, and that this shortage took place in the month of May, and that was the only month in which there was lack of material to perform its contracts. At that time it was manufacturing garments under its formal contract No. 2135, dated September 12, 1917, which should have been finished, according to its terms, on December 29, 1917, but which, in fact, was not finished until near the end of July, 1918. Its own testimony (p. 50, Record) was to the effect that on the 1st day of May, 1918, it was short upon its contract about 1,000 pairs of breeches, and that it required to manufacture the 1,000 pairs of breeches 3,000 yards of material, and that the Government was short to the amount of about 3,000 yards of material, and that the shortage took place only on the above-named contract, and that there was no shortage on the formal contract No. 4156-N, dated June 29, 1918.

There appears in the testimony a statement signed "High Clothing Company by M. Straw," who was manager of claimant, giving a complete list of all of the material received by the claimant on contract No. 2135, the dates of the receipt of the material by it, and the number of manufactured articles delivered by it up to the date of the instrument. This signed statement by the claimant shows that it received from the Government to apply on that contract, from October 5, 1917, to and including May 31, 1918, 180,589 $\frac{3}{4}$ yards of O. D. cotton cloth; and that it received during the month of May over 25,132 yards of cotton cloth. That it received from the Government between October 5, 1917, and May 23, 1918, 44,346 yards of drilling, and of this drilling, the claimant received in the month of May 2,980 yards. This statement, signed by the claimant company, shows that between October 5, 1917, and May 31, 1918, it received enough cotton cloth to complete the entire contract for 65,000 cotton breeches and enough more so that 1,524 yards of cotton cloth and 2,245 yards of drilling were transferred to the contract No. 4156-N, and yet this contract 2135 was not completed by the claimant until near the end of July, 1918, while contract 4156-N was not completed until during November, 1918. There was no shortage of material at any time on either of the formal contracts heretofore described, 2135 and 4156-N. (Item 1, findings of fact.)

The above considerations, together with the claimant's own statement that—

"the above machines were bought special for the prosecution of the two contracts, 2135 and 4156-N, during the period of beginning September 12, 1917, and ending November 12, 1918,"

the precise time within which it was performing the formal contracts, disposes clearly of the claimant's items for idle labor, \$7,700 and \$2,550, and also of its supposed loss on account of the purchase of 22 special machines, \$4,343. (Findings of fact 2 (a) (b) (c).)

As to the claimant's item (d) (findings of fact 2) for—

"22 weeks' profit lost on average output of 3,000 pairs per week at net profit of \$20, amounting to \$13,200,"

we hold that if its loss of profits was occasioned by the idleness of the factory during the selected 22 weeks between May 1, 1918, and November 12, 1918, so far as the same was loss chargeable to the formal contracts, it is disposed of by lack of jurisdiction of this Board to consider it at all; and so far as such loss of profits was caused on claimant's alleged informal contracts with the Government, it is specifically excluded from allowance by the terms of the act of March 2, 1919, under which the claimant claims. But we may add also that even if the Board had jurisdiction to consider and adjust such loss, it is so evident that the loss was not caused by any act or acts of the Government that the claim must in any event be disallowed. Claimant's counsel at the hearing admitted the correctness of this view (pp. 10 and 11, Record).

2. It would seem that the decision of this case might rest upon the above considerations, but the claimant alleges that some of its loss—but what part of it does not clearly appear—was caused by the payment for labor while its factory was idle between August 20, 1918, and November 12, 1918, because of contracts which were promised to it during that time and which were not forthcoming. Why this claim should be made in view of the fact that during all of this time it was working under the formal contract No. 4156-N is difficult to understand, but it is placed apparently, partially at least, upon the ground that its factory was not working to its full capacity, though the evidence on that branch of the case is elusive and unsatisfactory.

It appears that about July 29, 1918, labor troubles arose in the claimant's plant of such nature that deliveries under its contract No. 4156-N for 18,000 pairs of cotton breeches were being delayed and that the garments turned out by its dissatisfied help were defective and some of them therefore subject to rejection. The Government by reason of and under the authority of clause 11 of that formal contract undertook to adjust these difficulties, and to that end sent Prof. William Z. Ripley, of the Administration of Labor Standards, Office of Quartermaster General of the Army, to examine into the

matter and to take such action as was necessary in the interest of the Government to overcome the difficulty. It is not necessary to go into the transactions of Prof. Ripley further than to say that he found such conditions to exist that he rendered a decision August 15, 1918, which rendered the claimant incompetent to receive further contracts from the Government. Subsequently and on or about September 20, 1918, at a meeting in Washington at the Office of the Quartermaster General, it was arranged that should the contractor comply with the decision rendered by Prof. Ripley and should it give satisfactory undertaking to comply thenceforth with the decision and with the recommendations laid down by the Administration of Labor Standards for Army Clothing, Prof. Ripley would recommend to the Director of Purchase that he remove the inhibition against giving the claimant further contracts. Thereafter correspondence took place between the Administration of Labor Standards for Army Clothing and the claimant set forth above (item 5, findings of fact). From this correspondence it appears that the claimant did not give its undertaking to comply with the rulings by the Administration of Labor Standards for Army Clothing until October 7, 1918; and whether or not this Administration ever notified the Director of Purchase of the receipt of this undertaking, or whether the Director of Purchase (the only officer who could do so) ever removed the inhibition, does not appear, except that the testimony of Harry L. Wells, Chief of the Uniform Branch of the Clothing and Equipage Division, is to the effect that—

“At the time when the last bids were submitted prior to the signing of the armistice this firm (the claimant) was still disapproved for contracts both by the Bureau of Labor Standards and the New York Zone Supply Office.”

Claimant alleges and bases its claim on the allegations that the inhibition from becoming a Government contractor was removed on September 20, 1918, which it clearly was not, and that it was between that date and the date of the signing of the armistice when it entered into the informal contracts with the Government upon which it is basing such loss as occurred to it after August 20, 1918. The strongest statement that can be made of the claimant's supposed informal contracts is probably that which it makes for itself on pages 2 to 4, inclusive, of its statements found in the files of the case, which may be abstracted as follows:

I was referred to the New York Quartermaster General's Office for new business. On September 23, 1918, I called on Mr. Wells and explained the situation, that the controversy with Prof. Ripley was settled and that the High Clothing Co. was to get a new contract immediately. I explained to Mr. Wells that we had over 100 employees waiting for the work; Mr. Wells replied that they would not issue contracts, but advised me to submit a proposal for any quantity of

wool trousers, and stated that the Government was to manufacture four and a half million pairs. Relying on this statement, I bought a new factory of 100 machines and submitted a bid for 200,000 pairs of wool trousers at 74 cents. At the same time I asked Mr. Wells whether they had any emergency contracts, and his answer was "No"; and added that we must wait until the opening of the bids. Other contractors were getting emergency contracts. At the same time our factory of over 100 people, which we used to manufacture the 65,000 pairs of cotton breeches had to go around idle. (Note.—They were still engaged on formal contract 4156-N.) On September 25 we wrote a special letter to Mr. Wells, asking him to give us work for immediate start. And again I called on him, and he told me that all new contracts for which bids were submitted would not be ready for a few weeks, and advised me to see Mr. Tully in reference to the manufacture of convalescent suits, because he said they were ready to issue contracts for immediate start on the same. I then saw Mr. Tully, and he advised me we would get 3,000 convalescent suits per week provided we could make them at \$1 a suit, and I agreed; but he advised me that we should wait for the approval of the new factory and take convalescent suits for both factories. We waited until October 10, when the factory was inspected and approved. Then I went to see Mr. Tully and told him the new factory was inspected and approved and we were ready to accept contracts for convalescent suits, and he advised me that Maj. Jones had sent in a recommendation against us, claiming our latest manufacture was defective. Then I explained to Maj. Jones the whole situation, that the defective goods were made when our people were on strike and that Prof. Ripley compelled us to reinstate incompetent employees. I asked Maj. Jones to search our past records and he would find that out of 65,000 pairs of breeches delivered we had only four pairs of rejects, and the major was satisfied and finally wrote a letter to the Quartermaster General's Office explaining my statement. The following day (some time after October 10) I went to see Mr. Tully, and he was satisfied that the High Clothing Co. should get a new contract, but he advised me not to take any convalescent suits because of the fact that the bids for wool trousers had been opened, and we were among the successful (lowest) bidders. And finally the consequence was that we did not get anything at all until the armistice was signed.

The above testimony is relied upon by the claimant as establishing an informal contract or informal contracts upon which it alleges that all of its loss after August 20, 1918, was based. We have shown that it was practically impossible for any of claimant's alleged loss to have occurred on any contracts whatever prior to August 20, 1918, and the above testimony falls far short of establishing any informal contract whatever by which either the claimant or the Government was bound to the other to do anything, or upon which any loss could have occurred after August 20, 1918, to the end of the period stated by claimant within which its loss was supposed to have occurred.

Mr. Tully, to whom the claimant referred, testified at the hearing that there never was an informal contract between the claimant and the Government and that there never was one promised to the claimant. (Record, p. 109 et seq.) Nor does the claimant, when stating the testimony most strongly for itself, claim that there actually was such a contract. On these considerations the claim should be disallowed.

DISPOSITION.

The claim is disallowed.

Col. Delafield and Mr. Howe concurring.

Case No. 1859.

In re CLAIM OF TWOHY BROS.

1. **CONSTRUCTION OF CONTRACT—ERRORS OF CLAIMANT'S EMPLOYEES.**—
Under a cost-plus contract the Government is not responsible for failure of claimant's employees to collect certain sums due claimant from its own workmen.
2. **SAME—COMMISSARY CONTRACT—SETTLEMENT OF.**—Where, acting on the suggestion of the officer in charge of construction, claimant operated a commissary as a subcontract and, on disapproval of this course by higher authority, settled the claim of the subcontractor by employing him as manager of a commissary operated directly by claimant, and the Government paid for the redemption of outstanding meal and bunk tickets issued by the subcontractor, the Government has no further liability on account of this commissary contract. In particular it is not liable to claimant for a sum paid by claimant to the subcontractor after completion of the prime contract in settlement of all claims under the subcontract.
3. **SAME—SALARIES OF SUPERINTENDENT AND OFFICE MANAGER.**—
Where such salaries were expressly included in the contract as items in the cost of the work and toward the end of operations the superintendent and the office manager were relieved and their assistants promoted and charged with the duties of those offices as well as their former duties, the claimant is entitled to reimbursement of the difference between the salaries of the higher and the salaries of the lower positions, since the assistants after their promotion actually received the salaries of the higher positions.
4. **CLAIM AND DECISION.**—Claim presented in accordance with General Order 103 comprising a number of items and based upon a formal contract for construction work at an aviation field. Held, claimant is entitled to payment on some of the items as above indicated.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This claim is presented in accordance with General Order 103, War Department, 1918, and is for \$3,475.65, under the following circumstances:
2. On March 2, 1918, claimant entered into a formal written contract, No. 484, with the United States Government, acting through

Colonel C. G. Edgar, Signal Corps, United States Army, for the construction work at March Field, Riverside, Calif.

3. The contract was fully completed and on October 2, 1919, John Twohy, president of claimant company, signed and delivered to the Government a release from any and all claims and demands whatsoever, in law and equity, which claimant company or its successors or assigns may have against the United States, but reserving whatever rights claimant company may have had in respect to certain deductions.

4. The claim herein is presented under the reservation in said release and is made up of 11 distinct items, which for convenience will be set out separately and so considered.

Item No. 1. Pay-roll deductions, \$298.37.

Item No. 2. Long-distance telephone call, \$4.60.

Item No. 3. Additional salary to Mr. J. C. Donnelly, \$760.

Item No. 4. Additional salary to J. L. Horan, \$350.

Item No 5. Commissary advances, \$1,000.

Item No. 6. Release of commissary contract, \$1,000.

Item No. 7. Union Hardware & Metal Co. invoices, \$29.28.

Item No. 8. Overdeduction, commissary cash receipts, \$44.50.

Item No. 9. Riverside Portland Cement Co., \$53.93.

Item No. 10. Payment of wages to Francesco Castro, \$2.25.

Item No. 11. Pacific States Electric Co., \$15.85.

5. Items Nos. 7 and 9, viz, Union Hardware & Metal Co. invoice, and Riverside Portland Cement Co., have been withdrawn by claimant and will not be considered in this opinion.

6. *Item No. 1. Pay-roll deductions, \$298.37.*—This item arose out of errors made by the contractor's employees in failing to collect amounts due from workmen employed on the work. (See affidavit of W. J. Wiley, auditor for claimant company.)

7. *Item No. 2. Long-distance telephone call, \$4.60.*—Claimant has failed to show either by testimony or by receipt from the telephone company that this call was made on official business in connection with the contract.

8. *Items Nos. 3 and 4. Additional salary to J. C. Donnelly and J. L. Horan.*—These items may be considered together, as they both arise out of the same transaction and the same evidence is applicable to each of the items. During the construction of March Field, Capt. W. H. Carruthers was the officer in charge of construction at March Field, and was representing the contracting officer. During the latter part of May, 1918, the work was nearing completion and the office and field forces of the contractor were being gradually reduced. The general superintendent, G. W. Boschke, and the office manager, W. H. Gosline, were released, and Mr. Horan and Mr. Donnelly, who had been their assistants, were promoted to succeed them and

to carry on their own work and the work of their former superiors. After they were installed as general superintendent and office manager, respectively, by the claimant company, the matter was taken up with Capt. Carruthers, and after some discussion he authorized an increase in salaries to Messrs. Horan and Donnelly to correspond with the salaries formerly drawn by Boschke and Gosline, this increase to take effect from the time they assumed the duties of their former superiors. (See affidavit of Capt. Carruthers, Government Exhibit I.) The positions formerly held by Messrs. Horan and Donnelly were abolished. Afterwards vouchers for shortage of pay to Messrs. Horan and Donnelly were presented to Capt. Carruthers and were approved by him. (See Government Exhibit K.) The increased salaries were paid to and the money received by Messrs. Horan and Donnelly. (See affidavit of W. J. Wiley, Exhibit D.)

9. *Item No. 5. Commissary advances, \$1,000.*—During the month of March, 1918, on or about the 23d, Capt. Carruthers suggested to the contractor (claimants herein) that a commissary be opened and handled as a subcontract under the general contractor. Conforming to this suggestion on the part of Capt. Carruthers, Twohy Bros. entered into negotiations with the Sullivan Commissary Co., and a commissary was opened and meal and bunk tickets were sold to the men. Under the terms of this agreement the Sullivan Commissary Co. were to be allowed 2 cents per meal on all meals served to the men. In the early part of April this action was disapproved by the Secretary of War and Twohy Bros., claimants herein, were ordered to operate the commissary themselves; but in order to compensate the Sullivan Commissary Co. for services actually rendered under the agreement disapproved, D. Sullivan, of the Sullivan Co., was employed as manager of the commissary for Twohy Bros. and placed upon the pay roll in the capacity of manager of commissary as of the date of the original opening of the commissary, to wit, March 23, 1918, and rendered services as such manager and was paid therefor. Thus, the disallowed agreement was canceled and merged in the subsequent adjustment and any obligation arising from the 2 cents per meal basis of compensation was settled by accord. It then became necessary to redeem the meal and bunk tickets which had been sold to the men by the Sullivan Commissary Co., and this was done, the Government, as appears in Exhibit M, Commissary Statement No. 37, paying the sum of \$1,420 to redeem these outstanding tickets. (Also affidavit of Capt. Carruthers, Exhibit I.) The field auditor for the Government, Mr. F. A. Byington, testified in this connection that the Sullivan Commissary Co. had been credited with all meal and bunk tickets on which refunds were made. (Tr. p. 44.)

10. *Item No. 6. Release of commissary contract, \$1,000.*—On the completion of the contract there was a controversy between Twohy

Bros., contractors, the claimant herein, and Mr. D. Sullivan, of the Sullivan Commissary Co., the Sullivan Commissary Co. demanding additional payment from Twohy Bros. In settlement of this controversy, Mr. John D. Twohy, president of claimant company, entered into an agreement with Mr. Sullivan whereby Twohy Bros. agreed to assume all responsibilities in connection with their original agreement with Sullivan Co. to operate the commissary and to pay Sullivan \$1,000. (Affidavit of Capt. Carruthers and statement of John D. Twohy, Exhibit F.)

11. *Item No. 8. Overdeduction, commissary cash receipts, \$44.50.*—On this item Mr. F. A. Byington, field auditor, testified (Tr. p. 51) that there was an error in bookkeeping and that this \$44.50 was deducted improperly and that claimant was entitled to that sum of money.

12. *Item No. 10. Wages of Francesco Castro, \$2.25.*—This item of \$2.25 is for unclaimed wages to an employee who failed at the time of payment to appear and collect his money, and this money was afterwards paid to him, as appears from the cancelled check in the files. The field auditor, Mr. F. A. Byington, testified that this is an accurate and proper charge against the Government. (Tr. p. 52.)

13. *Item No. 11. Pacific States Electric Co., \$15.85.*—During the progress of the work at March Field certain goods were ordered from the Pacific States Electric Co. at Los Angeles, Calif., to be shipped by freight to Alessandro, the station nearest March Field. The Pacific States Electric Co. did not have the goods in stock and ordered them from San Francisco, shipped by express. The goods were shipped, and this bill is for the express charges from San Francisco to Alessandro. The express charges, amounting to \$15.08, were approved by Capt. Carruthers, officer in charge, but the freight charges of 77 cents were disapproved.

DECISION.

1. This Board is of the opinion that as to items Nos. 1, 2, 5, and 6, no relief can be granted for the following reasons:

2. *Item No. 1. Pay-roll deductions, \$298.37.*—The Government is certainly not responsible for errors of claimant's own employees.

3. *Item No. 2. Long-distance telephone call, \$4.60.*—No evidence has been produced to show that the telephone call was on official business in connection with the contract.

4. *Item No. 5. Commissary advances, \$1,000.*—As to the redemption of the meal and bunk tickets, the evidence clearly shows that the Government has advanced the money and has paid for all of these, and that there is nothing now due from the Government for the redemption of any of these meal or bunk tickets.

5. *Item No. 6. Release of commissary contract, \$1,000.*—It appears that this item of \$1,000 paid by Twohy Bros. to the Sullivan Commissary Co. was a private settlement on a private agreement between the contractor, claimant herein, and the Sullivan Commissary Co., and that the Government is not liable either to the Sullivan Commissary Co. or to Twohy Bros., claimant herein, for the same.

This Board is also of the opinion that as to items 3, 4, 8, 10, and 11, claimant is entitled to relief, for the following reasons:

6. *Items 3 and 4. Additional salary to J. C. Donnelly, office manager, and J. L. Horan, general superintendent.*—The contract provides specifically for salaries of superintendents and employees of contractor's field offices.

"ARTICLE II. *Cost of the work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items.

"(f) Salaries of resident engineers, superintendents, timekeepers, foremen, and other employees at the field offices of the contractor in connection with said work."

The two men were employed as general superintendent and office manager, respectively. Such employment and the amount to be paid for the respective positions was approved by Capt. Carruthers, officer in charge of construction, the representative of the contracting officer. The fact that the two men, who had previously filled the positions of general superintendent and office manager, were relieved and Donnelly and Horan, who had been assistants, were promoted and were performing each the duties of both principal and assistant in the respective positions did not abrogate the major positions. The change was in the interest of the Government, was approved by the authorized officer in charge, and was not only fair and equitable but was within the strict terms of the contract. Article XV provides:

"It is understood and agreed that wherever the words 'contracting officer' are used herein, the same shall be construed to include his successor in office, any other person to whom the duties of the contracting officer may be assigned by the Secretary of War, and any duly appointed representative of the contracting officer."

Captain William H. Carruthers, Signal Corps, was the officer in charge of construction.

7. *Item No. 8. Overdeduction, commissary cash receipts, \$44.50.*—This item arose through an error in bookkeeping on the part of the Government officers and is due the contractor and should be settled.

8. *Item No. 10. Wages of Francesco Castro, \$2.25.*—The Government received the benefits of the work of Francesco Castro and the amount of item No. 10 was paid by the contractor to him, but was

not figured in the settlement with the claimant, and should be now settled by the Government.

9. *Item No. 11. Pacific States Electric Co., \$15.85.*—This item was approved by the officer in charge for the sum of \$15.08 at the time that it was incurred and should have been included in the settlement with contractor.

DISPOSITION.

The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Air Service, for appropriate action in accordance herewith.

Col. Delafield and Mr. Averill concurring.

Case No. 1711.

In re **CLAIM OF McCORD MANUFACTURING CO. (INC.).**

- 1. SUPPLEMENTAL AGREEMENT—INFORMAL CONTRACT FOR EXTRA UNITS AND PARTS.**—Where claimant had entered into a formal contract to furnish the United States Government with a quantity of radiators and fan units complete and it was later agreed to amend said contract by supplemental contracts which were agreed upon but never executed by reason of the signing of the armistice, the agreements to have been embodied in the supplemental contracts constituted an informal contract, within the meaning of the act of March 2, 1919.
- 2. CLAIM AND DECISION.**—This claim for \$106,053.41 arises under the act of March 2, 1919, upon the theory that certain amendments to a written contract were agreed upon but never executed and that claimant suffered loss by reason of the suspension thereof. Held, that the agreements which were to be embodied in the supplemental contracts constituted an informal contract under the act of March 2, 1919, between the parties and that the claimant is entitled to reimbursement.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

1. This claim was submitted to this Board as a Class B claim through the Ordnance Claims Board and from the Detroit Claims Board, for determination as to whether or not there exists an agreement relative to extra complete units and extra assembled parts manufactured by the claimant and not covered by the original contract or any of the written supplements thereto. The amount of this claim is \$106,053.41.

2. On April 18, 1918, the Procurement Division, Ordnance Department, issued War Order P6173-1231ME of same date to claimant, calling for 4,440 complete radiators and fan units (meaning 4,440 assembled radiators and 4,440 assembled fans) for 6-ton special tractors at a price of \$186.20 each. This contract was completely performed, the full number of units being delivered and contractor paid for same, with the exception of 5 per cent of the total price, amounting to about \$30,000, which was withheld by the Government under line 24 on page 1 of the contract. This amount is still unpaid pending adjustment of this claim.

3. On May 14, 1918, the claimant received a letter and list of spare parts signed by F. M. Seig, captain, Ordnance Reserve Corps, ordering an additional 15 per cent (666) assembled radiators and (666) assembled fans.

4. On May 31, 1918, claimant received a written order from G. Hutchinson, major, Ordnance Reserve Corps, calling for an additional list of loose spare parts for radiator repairs and fan repairs.

5. On July 9, 1918, claimant received from F. M. Seig, captain, Ordnance Department, a letter increasing the number of additional assembled radiators ordered to 20 per cent of the original contract (888).

6. In October, 1918, claimant received a supplemental contract dated September 26, 1918, covering the loose spare parts for radiator repairs and fan repairs, hereinbefore referred to in paragraph 4, but which failed through error to include the 888 additional assembled radiators and 666 additional assembled fans referred to in paragraphs 3 and 5, above. The terms of this supplemental contract also increased the price by reason of substituting heavier copper tubing in radiators, at Government instance, to be paid for complete radiators and fan units (one assembled radiator and one assembled fan each) to \$193.85 each, instead of \$186.20 each, as in the original contract. The price of one assembled radiator and one assembled fan, according to this revised price, would be \$155.81 and \$38.04 each, respectively.

7. The fact that the 888 assembled radiators and the 666 assembled fans had not been included in the supplemental contract was promptly called to the attention of the Government by the claimant. The record indicates that it was the intention of both parties that an additional supplemental contract, to cover the two items last above mentioned, should be entered into as is evidenced by a letter written from the claimant's representative in Washington to claimant, under date of October 31, 1918.

8. A staff report of the District Claims Board, Detroit, appears on the file, which shows all the material involved in the claim and its place of location and recommends settlement in the amount of \$54,584.04, which does not, of course, include the item of about \$30,000 withheld on the original contract as mentioned in paragraph 2 above, which item is stated in said report to have been eliminated from this claim entirely, to be disposed of by the Finance Division.

DECISION.

The evidence conclusively shows that the manufacture of the two items referred to in paragraphs 3 and 5 hereof was authorized by the Government; that the failure to cover these items at the in-

creased price mentioned in the supplemental contract of September 26, 1918, was an error of omission which it was the intention of the Government to correct, when the armistice intervened. This Board, therefore, holds that an informal agreement within the meaning of the Dent Act exists between the Government and the claimant under which the claimant has incurred obligations and made expenditures for which it is entitled to be reimbursed.

DISPOSITION.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision (c), section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Shaw concurring.

Case No. 367.

In re CLAIM OF GOULD-MERSEREAU CO.

1. **CANCELLATION.**—Where claimant enters into a contract with the Government to purchase certain manufactured articles and thereafter, by mutual agreement, this contract is cancelled, the Government is not liable for material theretofore procured to perform said contract, notwithstanding the fact that at the time of cancellation claimant was told that, in view of such cancellation, it would be given special preference in the event of future orders being placed for similar articles.
2. **CONTRACT.**—Where claimant had on hand, at the time of the armistice, certain completed articles, and it is not shown that it had the promise of the Government for any specific orders for same, there is no liability on the part of the Government under a contract, express or implied, for the value of said articles or any part thereof.

Lieut. Col. Carruth writing the opinion of the Board.

NAME AND ORIGIN OF CLAIM.

1. This case comes up on a petition for rehearing filed by the claimant subsequent to the decision of this Board of December 6, 1919, denying claimant's claim as set forth in its then petition. It is convenient to restate the facts.

2. The claimant filed a Class B claim under act of March 2, 1919, according to Purchase, Storage, and Traffic Division Supply Circular No. 17 (1919), for \$28,921.08, less \$8,638.93 for salvage, by reason of an agreement alleged to have been entered into between the claimant and the United States.

3. At the hearing of this case on September 4, 1919, the claimant alleged that on or about July 25, 1918, Capt. Charles B. Price, procurement officer, Hardware Section, Equipment Division, Ordnance Department, ordered orally from it, through its secretary, Mr. E. A. Merriam, 3,000,000 "D" rings and 5,000,000 strap loops; that thereafter, on or about September 18, 1918, the claimant and the Government, represented by Mr. W. F. Fusting, Chief of the Small Tools and Chest Branch, Hardware Section, Capt. Price, and Mr. Oliver A. Lanchantin, who at that time was preparing himself to succeed Capt. Price, mutually agreed to cancel the said verbal order; that at the same time the claimant was assured by the representatives of

the Government that it would be given special consideration on future business, providing prices, quality, and production were satisfactory. It was further developed that on or about September 18, 1918, the claimant was given an oral order for 2,300,000 strap loops and 812,314 "D" rings, for which it was paid, in full by the Government. The claimant alleged further that acting upon the information it received from Capt. Price in July, 1918, it proceeded to procure the raw materials that would be required in fulfilling said order for rings and loops. The claimant was denied relief by the Board on the ground that the alleged verbal order of July 25 was mutually canceled.

4. The petitioner requested a rehearing for the purpose of further developing its case on the theory that Mr. Lanchantin made certain representations and statements subsequent to September 18, 1918, upon the faith of which the claimant alleges it incurred certain expenditures and obligations, for which it is now seeking compensation from the Government. The petition for rehearing was referred to the Standing Committee on Rehearings of the Board, which recommended that the claimant be given an opportunity to present any further evidence that it may have bearing upon its relations with Mr. Lanchantin and, if possible, to develop its case subsequent to September 18, 1918.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. Claimant is now seeking to recover the sum of \$39,537.93 for finished articles, articles in process, and raw materials on hand, less \$19,255.78 for salvage. The items of the claim are briefly summarized as follows:

Finished goods.....	\$15,700.00
Wire on hand.....	10,220.00
Solder on hand.....	258.00
Wire on order.....	13,159.93
Machine cutting and forming.....	200.00
Total claimed.....	39,537.93
Salvage:	
Finished goods.....	\$3,878.93
Wire on hand.....	4,760.00
Wire on order.....	10,616.85
Deductions	19,255.78
Net claim.....	20,282.15

2. The claimant alleges that its secretary, Mr. E. A. Merriam, had several conferences with Mr. Lanchantin during the latter part of September, October, and November, 1918, and that at several of

these conferences Mr. Lanchantin instructed its secretary to continue the manufacture of strap loops and "D" rings, to increase production as much as possible, to keep up production at fullest capacity, and that a formal order would come through.

3. Mr. Lanchantin testified, in substance, that the first conference with Mr. Merriam at which he told him to continue the manufacture of "D" rings and strap loops was about October 10, 1918, and that he repeated these instructions at one or two subsequent conferences. Mr. Lanchantin's testimony with respect to these conferences is in part as follows:

"Q. * * * Do you remember what you said to Mr. Merriam with reference to keeping up production, or if you urged him or requested him to keep up production?

"Mr. LANCHANTIN. In that conversation?

"Q. In these conversations that you had subsequent to September 18, 1918.

"Mr. LANCHANTIN. In that telephone conversation * * * about the middle of October. I am fairly positive that I did suggest to him, and I don't remember my exact words, whether it was a suggestion, or request, or just what it was, but I did certainly suggest in some way or other that he keep up production all possible.

"Q. Keep up all possible production? Why did you make that suggestion to him, Mr. Lanchantin?

"Mr. LANCHANTIN. I made that suggestion because I knew of the quantity of material that was anticipated to be placed because of the requisitions I had in hand and the recommendations I had not yet made out, and because of the fact that I knew he had the raw material on hand to keep up production with, and the quantities were so large on the recommendations that I intended to place that I was fairly certain that we could utilize his production. (Transcript, pp. 123 and 124.)

"Q. At this conversation, which was probably prior to October 16, did you tell Mr. Merriam to go ahead and keep up to full capacity, keep up production?

"Mr. LANCHANTIN. Do you mean the verbal conversation while in the office?

"Q. Yes.

"Mr. LANCHANTIN. I probably did.

"Q. Well, do you remember whether you did or not?

"Mr. LANCHANTIN. In fact, I am sure I did at that time, because every manufacturer that came in around that time I told him the same thing, provided he had the raw materials to do it with.

"Q. Provided he had raw materials to do it with?

"Mr. LANCHANTIN. Yes.

"Q. Even though they did not have an order and you were not in a position to give them an order or give them any definite information as to the recommendation that you would make, yet you did say to Mr. Merriam and others along about this time for them to keep up production?

"Mr. LANCHANTIN. Yes, sir; I did.

"Q. And to go right ahead manufacturing D rings and strap loops?"

"Mr. LANCHANTIN. Yes; and D rings and strap loops in particular. * * * (Transcript, pp. 129 and 130.)"

"Q. When was your first conversation with Mr. Merriam in which you told him to keep up full production?"

"Mr. LANCHANTIN. Why, it was somewhere, I presume, around the 10th of October. It was somewhere in that week." (Transcript, p. 134.)

4. The claimant alleges that all raw materials on hand at the time of the signing of the armistice, and for which it is now seeking reimbursement, were ordered upon the faith of assurances and instructions given to it by Mr. Lanchantin. However, at the hearing Mr. Merriam testified that all of said raw materials were ordered prior to its alleged agreement with Mr. Lanchantin. Mr. Merriam's testimony in this connection is as follows:

"Q. Mr. Merriam, in connection with your claim you were requested, I believe, on the former hearing, to submit to the Board a statement outlining the dates upon which you placed orders for raw materials to be used in the manufacture of the D rings and strap loops. In compliance with that request you submitted to the Board under date of September 8, 1919, a statement which purports to contain the information that was desired by the Board and signed by your company.

"I wanted to ask you with reference to that statement. I see you have listed here on August 27, 1918, the date that the order was placed, order No. 7939, 29,000 pounds .109 soft brass wire, and then several other orders following during the same month of August, 1918.

"Now, Mr. Merriam, those orders could not have been placed upon the faith of any understanding that you had with Mr. Lanchantin, could they?"

"Mr. MERRIAM. No. Those orders were placed on account of the verbal order that was given me on July 25th for 8,000,000 rings and loops.

"Q. And were not placed upon the faith or understanding that you had from the conversation with Mr. Lanchantin subsequent to September 18, 1918?"

"Mr. MERRIAM. No.

"Q. Can you present to this Board evidence that you did make purchases of raw material to be used in the manufacture of the D rings and strap loops subsequent to September 18, 1918, and based upon the faith of an understanding that you had with Mr. Lanchantin?"

"Mr. MERRIAM. No.

"Q. The raw material that was used, then, in continuing your production through the latter part of September and October and the fore part of November was material that you had procured back in July and August or back in August or prior to the date of your conversation with Mr. Lanchantin?"

"Mr. MERRIAM. Yes.

"Q. And it was not purchased, then, Mr. Merriam, upon the faith of any understanding that you had with Mr. Lanchantin?"

"Mr. MERRIAM. No." (Transcript, pp. 137, 138, and 139.)

5. Mr. Lanchantin also testified that during the latter part of November, 1918, he recommended that an order be placed with the claimant company for all the rings and loops which it had manufactured and on hand, namely, 1,500,000 "D" rings and 1,000,000 strap loops, but that the order was never issued by the War Department on account of the signing of the armistice.

DECISION.

1. The Board is of the opinion that on or about October 10, 1918, an oral agreement was entered into by the Government, represented by Mr. Lanchantin, and the claimant, for the entire production of strap loops and "D" rings which the claimant could produce from the time the said agreement was entered into to November 11, 1918, and that the claimant is entitled to reimbursements under the provisions of the act of March 2, 1919, for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said agreement.

2. As no goods have been delivered to or accepted by the Government in this case, the only award which can be allowed is a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform the said agreement. This includes the rings and loops manufactured at the time the armistice was signed, and also articles in process.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C section 5, Supply Circular No. 17, Purchase, Storage, and Traffic Division.

Col. Delafield and Mr. Van Wagoner concurring.

Case No. 1228.

In re **CLAIM OF THE L. H. GILMER CO.**

- 1. SETTLEMENT AGREEMENTS—AMENDMENT OF CLAIM.**—Where the claim is based on the theory that in making settlement agreements upon a number of Government contracts the item claimed was not included in the settlements, and where said settlement agreements each contained a release to the Government of all claims under the original contract, and where permission was given to claimant by this Board to amend its petition within a specified time, to set forth and describe said claim, and to present evidence in respect to the circumstances under which it executed the settlement agreements, and claimant failed or refused to comply with said permission, relief will be denied.
- 2. CLAIM AND DECISION.**—This is a claim for \$2,954.55, under the act of March 2, 1919, and is made in Form B. The claim is based upon expenditures made for equipping a dye plant in order to handle Government contracts. Held, that claimant is not entitled to relief.

Mr. Eaton writing the opinion of the Board.

FINDINGS OF FACT.

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for \$2,954.55, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant has filed with its petition copies of eight different contracts with the United States. Six of them appear to be formal, duly executed contracts, one is a purchase order, and one a commandeering order. The claimant has executed settlement agreements for all of these eight contracts, and in each of them it has released the United States from further claims under the contracts.

3. The claim is that the amounts paid to the claimant in settlement of these eight contracts cover only the claimant's losses on material purchased for the performance of the contracts, and that the District Claims Board at Philadelphia did not allow the claimant any amount for the unabsorbed amortization of the dye plant which it had constructed.

4. At the hearing before this Board on January 14, 1920, the claimant was given an opportunity to amend its petition, and to present evidence in respect to the circumstances under which it executed its settlement agreements. It was stipulated that the amendment must be received on or before 30 days from January 15, 1920. More than 30 days have now elapsed, and the claimant has presented no request to amend its petition.

DECISION.

The evidence before this Board shows that the claimant presented its claim against the Government in respect to its eight contracts, and that it has been paid a sum which it has accepted, and that it has executed eight settlement agreements, in each of which it has released the United States from any further obligations in respect to its contracts. The claimant is therefore entitled to no relief.

DISPOSITION.

A final order will be entered denying the claimant relief.
Col. Delafield, Mr. Howe, and Lieut. Tanner concurring.

Case No. 627.

In re **CLAIM OF NEW AMSTERDAM CASUALTY CO.**

- 1. SURETYSHIP—RIGHTS OF SURETY AGAINST CREDITOR.**—Where claimant was surety on a bond conditioned for repayment of money loaned to a manufacturer by the Government, and on the manufacturer becoming bankrupt the Government established the priority of its claim against the bankrupt's estate and endeavored to find purchasers for war materials left on the hands of the bankrupt, which materials greatly depreciated on the signing of the armistice, no agreement can be implied under the act of March 2, 1919, by which claimant would be entitled to be credited on its liability under said bond with the difference between the value of the materials prior to the armistice and their value after the signing of the armistice.
- 2. SAME—EXONERATION.**—Where the depreciation of such materials was not due to negligence or any unreasonable delay on the part of the Government, the surety (claimant) is not entitled to be exonerated to the extent of such depreciation.
- 3. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an alleged implied agreement arising from a contract of suretyship. Claim denied.

Mr. Shaw writing the opinion of the Board.

FINDINGS OF FACT.

This Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage, and Traffic Division Supply Circular No. 17, 1919, for an indefinite amount by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. On January 22, 1918, the Office of the Chief of Ordnance issued a purchase order, War Ord. CF-489, to the Wagner Axle Co., of Anderson, Ind., for the manufacture of 5,000 56-inch artillery hubs for \$20.02 each.

3. After the acceptance of this purchase order the Wagner Axle Co. secured from the War Credits Board a loan of \$30,000 to be used in the purchase of machinery, materials, etc., necessary to carry out this contract, and on February 2, 1918, the Wagner Axle Co. entered into a supplemental agreement with the Government which provided

for the repayment of this \$30,000 loan, the execution by the Wagner Axle Co. of a demand note for \$30,000 payable to the order of the Secretary of War, and the execution of a bond in a like sum conditioned on the performance by the Wagner Axle Co. of its obligations under the supplemental agreement.

4. In pursuance to said supplemental agreement on February 11, 1918, the Wagner Axle Co. as principal, and the claimant as surety, executed a bond to the Government for \$30,000, conditioned as follows:

"If the above bounden Wagner Axle Company, of Anderson, Indiana, shall return to the United States the full amount of said advance payment of \$30,000.00 and any interest payable thereon in the manner and method as above provided, and shall further well and truly perform the obligations on the part of the principal with respect to such advance payment, and the repayment thereof to the United States, in accordance with the terms and conditions under which the said advance payment shall have been made, as above set forth, then the above obligation shall be void, otherwise it shall remain in full force and effect."

5. In pursuance of said purchase order contract, the Wagner Axle Co. then proceeded with the manufacture of said hubs, but financial difficulties arising, it again applied to the Government some time during the month of April, 1918, for an additional advance or loan, but same was not granted.

6. On April 27, 1918, no deliveries having been made under said contract and default having been made thereon, the Government cancelled said contract.

7. During May, 1918, the Wagner Axle Co. having become insolvent and being unable to continue with said contract, it went into the hands of a receiver, the Madison County Trust Co., of Anderson, Ind., and on June 17, 1918, the Wagner Axle Co. was adjudged a bankrupt on petition of certain creditors, and on July 30, 1918, Lewis Palmer, of Anderson, Ind., was elected trustee and took charge of the assets of said bankrupt's estate. With the consent of the referee, the trustee has been made a party to these proceedings before this Board.

8. An inventory was made of that portion of the assets comprised of the hub material on hand, which is the subject of this controversy, and an appraisal of same was made, the appraised value being \$22,629.84. These materials were a war commodity, and upon the signing of the armistice their value decreased to such an extent that they were finally sold for junk early in 1919, netting to the trustee about \$1,700.

9. On June 18, 1918, the Government made demand upon the Wagner Axle Co. for the repayment of said \$30,000 and notified the claimant as surety that upon the failure of the Wagner Axle Co. to

comply with this demand proceedings would be instituted to enforce same against the surety. This demand for payment was afterwards repeated by the Government upon several occasions.

10. Upon the Wagner Axle Co. becoming bankrupt, the claimant called the Government's attention to the value of the materials on hand and suggested to the Government that it had a prior lien on all of the assets of said estate under section 3466 of the Revised Statutes, and the Government thereupon at once proceeded to file its petition with the referee in bankruptcy to have its claim allowed as a preference, and this was done by the referee, but appeal was taken from this ruling and said appeal was not finally disposed of until in the early part of the year 1919, when it was finally held that the Government had a prior lien.

11. A few days prior to October 22, 1918, claimant visited Washington and took up with the Attorney General's Office the matter of the Government taking over the materials in question or selling them to some manufacturer who might use them on a Government contract. On October 22, 1918, claimant's representative took this same matter up with Maj. G. R. Nichols, of the Procurement Division, Ordnance Department, with the same object in view. Both the Attorney General's Office and Maj. Nichols immediately proceeded to act in the matter according to the claimant's suggestion, and communicated with representatives of the Government in the district where the materials were located, directing that necessary steps be taken to either take over these materials or dispose of same to some one who could use them, and these initial instructions were followed up from time to time by various communications along the same lines until the armistice was signed. But before the materials could be disposed of, the signing of the armistice came about and the demand for the materials ceased, and they were later sold for junk, as above set forth. In the meantime the Government had furnished the trustee in bankruptcy with a list of manufacturers who might be possible purchasers of these materials and the trustee communicated with them, but no offers were made for the materials except one, which was made by the International Harvester Co.

12. In August, 1918, the International Harvester Co. made an offer of \$13,000 for a part of said materials, contingent upon its receiving a contract from the Government for the manufacture of 56-inch artillery hubs, but later on in October, 1918, this offer was changed and reduced to \$11,000. At the time of the original offer the trustee had not received authority from the referee to make sale, and after receiving such authority the offer was changed, but the sale was never consummated. A sale of these materials was ordered by the referee for October 19, 1918, but at this sale there were no

bidders. Afterwards attempts were made to carry out the sale to the International Harvester Co. above mentioned, but without success.

13. At a meeting before the referee on September 27, 1918, the matter of the postponement of the sale of October 19, 1918, was discussed by representatives of the claimant and the Government with a view of obtaining better offers for the materials than had been made, or were anticipated would be made at said sale of October 19, 1918, it being represented that a company might be organized for the purpose of taking over the materials and carrying out the contract.

14. About November 8, 1918, during negotiations between the trustee and the International Harvester Co., and when it was thought that said sale might be consummated, the Ordnance Department requested the trustee not to close the transaction until it was notified. It appears that a question of inspection arose in regard to the materials, the International Harvester Co. making its second offer contingent upon the materials passing Government inspection, and the Government was endeavoring to ascertain the district in which the materials would be used, so that they could be inspected by the proper officers of that district. Before the sale could be consummated the armistice was signed and the International Harvester Co. refused to comply with its offer.

DECISION.

1. Claimant contends that by having its claim on these materials allowed as a preference by the referee, the Government made an implied agreement with claimant to take over or dispose of the materials and allow claimant a credit to the extent of the value thereof on its liability under the above-mentioned bond. It also claims that after being requested to realize on the materials so as to reduce the liability of claimant on said bond, the Government was negligent in not so disposing of same before the signing of the armistice, which was the date when the materials depreciated in value. The further claim is made that the surety company is entitled to exoneration to the extent of the value of these materials which was lost because of the armistice and it is argued by claimant's counsel that the object of the act approved March 2, 1919, was to make the Government liable for loss caused by the armistice on the theory that the armistice per se was a negligent act of the Government. Claimant therefore urges that it is entitled to be credited on its liability under said bond with the difference between the fair appraised value of said articles before the date of the signing of the armistice and the selling value as junk after the armistice.

2. From the entire record, it is the opinion of this Board that at all times the Government acted without any unreasonable delay to

realize on these materials; that immediately upon request by claimant it took steps to dispose of same by first asserting its lien, and then starting the machinery by which it could dispose of the assets and that it worked all these matters in conjunction with the claimant to bring about such a disposition.

3. No unnecessary or unreasonable delay nor negligence on the part of the Government has been shown under all the circumstances of the situation.

4. Only about 21 days elapsed from the date the claimant requested the Ordnance Department to try to bring about a disposition of the materials until the signing of the armistice and it appears that the signing of the armistice was the real cause of the loss, and it is clear that negligence can not be imputed from the armistice.

5. In order that a surety avail itself of the rule of exoneration in such a case, there must be some act of negligence or some action on the part of the creditor which causes the property to be lost. Brandt's Suretyship and Guaranty (3d. vol. 1, sec. 498) states the doctrine thus:

"And if such effects are lost through negligence or want of ordinary diligence of the creditor, the surety is discharged to the extent that he is injured the same as if the effects had been lost by the positive act of the creditor."

We are of the opinion that the record fails to disclose any facts which make this rule applicable to this case.

6. It is our opinion that there was no implied agreement on the part of the Government with the claimant that it would take over the materials on hand and allow claimant a credit to the amount of their appraised value on its liability under the bond.

7. Although repeated demand has been made on claimant as surety for the payment of its debt to the Government under the aforesaid bond, no payment has been made.

8. It is therefore the opinion of this Board that the claimant has failed to show cause justifying an award in any amount.

Col. Delafield and Mr. Williams concurring.

Case No. 1202.

In re **CLAIM OF WM. L. BARRELL CO.**

1. **CONTRACT, CONSTRUCTION OF—LABOR-DISPUTES CLAUSE.**—Where the contract for the manufacture of an article provides certain procedure to be followed by the contractor in case of labor disputes likely to cause delay in the performance of the contract, such procedure must be complied with before claimant is entitled to recover additional compensation on account of increased wages.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for increased labor cost. Held, claimant not entitled to recover.

Mr. Howe writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Circular No. 17, 1919, by reason of an alleged agreement between claimant and the Secretary of War.

The claim is for reimbursement for additional cost incurred by claimant in performing a contract caused by a raise of wages made by claimant subsequent to the issuance of the contract and before completion.

STATEMENT OF FACTS.

Claimant is a manufacturer of cotton goods, with mills at Huntsville, Ala.

On December 5, 1917, claimant was awarded a contract for the manufacture of 240,000 yards of olive-drab duck, at 86 cents per yard, deliveries to begin in March, 1918, and to be completed not later than June 30, 1918.

This contract was embodied in a written instrument, dated January 12, 1918, which, however, was executed in proxy form.

The contract contained the following clause:

"ARTICLE 10.

"In the event that labor disputes shall arise directly affecting the performance of this contract and causing, or likely to cause, delay in making the deliveries upon the date or dates specified, the contractor shall require; and it is stipulated and agreed that the Secretary of War shall require, and it is stipulated and agreed that the Secretary of War may thereupon settle, or cause to be settled, such dispute, and that the contractor shall accept and comply with all the terms of such

settlement. If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract prior to such settlement, a fair addition to the basic purchase price of the articles shall be made therefor; but if such settlement reduces the labor costs of the contractor a fair deduction shall be made from the basic purchase price, all as may be determined by the contracting officer. No claim for addition or deduction on account of such settlement shall be allowed unless the same has been ordered in writing and actually put into effect."

Claimants started work under this contract, and up to May 20, 1918, had completed about two-thirds of the work to be done under it.

During March, 1918, claimants had some labor troubles with its operatives who wanted increased wages, which it brought to the attention of the Quartermaster Department, but it was informed by that department that these disputes did not constitute a situation covered by the terms of the above clause in the contract.

In May, 1918, the operatives in claimants' mills renewed their demands for an increase in wages, and became so insistent that on May 17, 1918, Mr. Sallo M. Kahn, the secretary of claimant company, had an interview in Washington with Maj. Frank W. Tully, at that time in charge of the Employment Management Branch of the Industrial Service Section of the Ordnance Department, who was authorized to deal with situations of this kind under the clause in claimant's contract, and requested Maj. Tully to send a representative to Huntsville to investigate and report for the purpose of affecting a settlement of the labor troubles and adjustment of claimant's compensation in accordance with the provisions of the contract.

The same day, May 17, Maj. Tully wired to Mr. E. S. Hudson, his representative, who at that time was at Sheffield, Ala., to proceed to Huntsville. Mr. Hudson did so and arrived at claimant's mill on May 20, 1918. In the meantime, however, and before Mr. Hudson could interview claimant's officials at the mill, claimant's competitors in Huntsville had already raised wages in their mills 13 per cent, and claimant in the exercise of its judgment as to what was necessary under the circumstances to prevent a walkout in claimant's mill had also, without waiting for Mr. Hudson, made a wage raise of about 13 per cent in claimant's mill. Under these circumstances there was nothing Mr. Hudson could do with relation to the propriety of the raise.

This raise applied to practically the entire mill force and caused an additional cost in the manufacture of the cloth under claimant's contract amounting to an average of 3 cents per yard on the balance of the yardage still to be delivered under this contract.

Subsequently, claimants made application to the Ordnance Department for an investigation of the reasonableness of its action in raising wages and for a formal approval thereof. Action on this appli-

cation reached the point of a recommendation by Maj. Tully that claimants' action be approved and claimant be compensated accordingly, provided it should appear after further investigation that such approval was justified. This recommendation, however, was never acted on, and no approval of claimants' action in raising wages was ever made.

Claimants proceeded to complete their contract under the new wage scale at an increased cost of 3 cents per yard. It is for this extra 3 cents per yard that this claim is brought.

DECISION.

1. It is not possible on the facts in this case to find any ground on which to base an agreement, express or implied, on the part of the United States Government to reimburse the claimant for the extra cost resulting from the increase in wages.

2. The only ground on which an express agreement to that effect could be based is the language of the clause in the contract above quoted relating to labor disputes. This clause is binding on claimant, and states the procedure necessary to be adopted by claimant to bring its provisions into operation. It appears clearly from the evidence that the requirements of this clause were never complied with, and that this noncompliance was not due to any fault of the Government, but to the action of claimant itself. For this reason no express agreement can be based upon the clause in the contract, and no agreement can be implied from the language of the clause taken in connection with such preliminary but uncompleted steps to comply with it as claimant, in fact, took.

3. Nor is any agreement on the part of the Government to be implied from the circumstances under which the raise in wages was actually made by claimant and the fact that the Government ultimately got the benefit of claimant's action through completion of the work which was endangered by the strike. The Government throughout observed and required strict adherence to the terms of the contract itself, and never authorized any deviation by claimants therefrom, nor approved claimant's action in raising wages without complying with the contract provisions, and claimant in acting on its own judgment of what was best to do under the circumstances, instead of in reliance on the procedure provided in the written instrument previously agreed on and which was binding on claimant in the absence of authority from the Government to the contrary, did no more than it was already obligated by its contract to do.

DISPOSITION.

1. The claim should be denied.

Col. Delafield and Mr. Harding concurring.

Case No. 1183.

In re CLAIM OF FRANK B. PERRY & SONS.

1. **MATERIALS—ANTICIPATED ORDERS.**—Where a contractor purchased materials with which to fill anticipated Government orders, there is no liability on the Government to reimburse the contractor on account of loss on such materials in the absence of an agreement, express or implied.
2. **FACILITIES—ANTICIPATED ORDERS.**—Where a contractor in anticipation of Government contracts erects a building in which to assemble product, there is no liability on the part of the Government to reimburse the contractor the expense of said building.
3. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for loss on materials and for the expense of erecting a temporary building for the purpose of filling Government contracts. Held, no agreement within the act of March 2, 1919.

Mr. Williams writing the opinion of the Board.

FINDINGS OF FACT.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$11,034.45, by reason of an agreement alleged to have been entered into between the claimant and the United States. This case grows out of the following facts and circumstances:

1. Mr. Frank B. Perry, who was an employee of the Westinghouse Electric Co. at the beginning of the war, developed a buzzer set to be used for aviation training purposes. Early in 1918 he secured a leave of absence from the company by which he was employed and engaged in the business of having the parts for this buzzer set manufactured, and he assembled them at his residence. Throughout the course of his operations he secured the following orders for these sets which were supplied to the Government and paid for:

May 3, 1918, for.....	20
May 28, 1918, Order No. 43016, for.....	5,000
June 21, 1918, Order No. 43202, for.....	100
July 1, 1918, Order No. 340007, for.....	90
July 6, 1918, Order No. 340024, for.....	75
July 8, 1918, Order No. 340025, for.....	75
July 12, 1918, Order No. 740022, for.....	25
July 12, 1918, Order No. 740024, for.....	100

	Sets.
Contract No. 976, dated May 18, 1917, Navy Department, for-----	1,000
Contract No. 1525, dated May 25, 1918, Navy Department, for-----	500
Contract No. 293, dated July 3, 1918, Marine Corps, for-----	300
Contract No. 293, dated Aug. 29, 1918, Marine Corps, for-----	12
Order No. 130633, dated November 19-----	12

His first order from the Government was on May 3, 1918, for 20 sets. These were satisfactory and were adopted by the Government. In the latter part of May, 1918, Mr. Perry came to Washington for the purpose of securing a large order, as an order for about 5,000 was at that time about to be placed for buzzer sets. He was promised the order for 5,000 sets and went back to his residence at Newton Center, Mass., to get ready for filling it. The order did not arrive in due course and about the middle of June he returned to Washington and secured the actual order. The other orders for these sets as mentioned in the above tabulated statement were received from time to time and filled.

2. It is alleged by petitioner that upon the visit of Mr. Perry to Washington in the latter part of May, 1918, and about the middle of June, representations were made to him by Lieut. Havelock Walser, Lieut. Col. Crystal, and Lieut. H. N. Carlson, all of the Air Service, that large orders for these buzzer sets were coming through and would be placed with him and that he must secure the materials with which to fill these orders and that he did secure the materials with which to fill them, and that at the time of the armistices, when no further orders came through, there was left on his hands unused material and commitments to the extent of \$9,661.61. It is also alleged that during the summer of 1918, in the assembling of the sets for which he had received orders, it was necessary for him to erect a temporary steel building, and that, under the circumstances creating this necessity, there arose upon the part of the Government an obligation to pay therefor the sum of \$1,372.84.

3. There was a full hearing of the case, and testimony presented by all of the Government officers with whom petitioner is alleged to have conferred with reference to these buzzer sets. The testimony clearly discloses the fact that no Government officer ever promised petitioner any definite order for any number of these sets that was not subsequently confirmed in writing and filled by petitioner and paid for by the Government. The testimony shows also that in the conversation that took place between Mr. Perry and the Government agents both at the conference in the latter part of May and at the conference about the middle of June, 1918, the Government agents believed that a great number of these buzzer sets would be needed by the Government, but no assurance of any sort was ever given petitioner that he would receive orders other than those which were actually received. A careful examination of the testimony of the Government witnesses

shows that the most that can be said of their statements to Mr. Perry is that they suggested to him or advised him in a business way that he should put matters in shape to fill orders that might be coming through. The testimony of Mr. Perry shows beyond any question that no orders except those which he received were ever promised to him, and shows further that in making preparations for the manufacture and assembling of the buzzer sets he was acting upon his own business judgment as to the amount of material to be secured for the assembly of these sets.

4. The erection of the temporary steel building was occasioned by the fact that petitioner did not have room in his residence and in his garage to assemble the buzzer sets that he had contracts to supply to the Bureau of Aircraft Production and to the Navy and to the Marine Corps. He made an effort to secure permission from the local authorities to erect a temporary frame structure but was denied this privilege. He then ascertained that he could secure a portable metal building from the E. P. Hudson Co., of Dover, Mass., and under date of July 17, 1918, wrote the Priorities Section of the Equipment Division of the Bureau of Aircraft Production asking assistance in getting this portable building allocated to him. The correspondence then followed which resulted in petitioner getting the portable building for the purpose of fulfilling the contracts which he then had for buzzer sets.

DECISION.

1. This Board is clearly of the opinion that there was no obligation of any sort created upon the part of the Government by the statements made by any officer, or by the circumstances surrounding the case to reimburse petitioner for any material or commitments secured or made by him in excess of that which was necessary to fill the orders which were actually received. He was merely exercising his own business judgment under the circumstances as they then appeared to him. He was fully aware that if the war had continued there would have been a great demand and need for these buzzer sets. As a matter of fact he did receive large orders for these buzzer sets, not only from the Bureau of Aircraft Production but from the Navy and the Marine Corps. There was nothing in any statement made to him by Lieut. Col. Crystal, or by Lieut Walser, or by Lieut. Carlson which justified him in making commitments or in purchasing material upon the theory that the Government was liable for supplying him with orders to use or consume it. Mere knowledge or information that the Government is or may be in need of a manufactured product will not of itself create a liability upon the part of the Government to parties purchasing material in anticipation of fulfilling such orders.

2. The claim on behalf of the erection of the temporary steel building in which to assemble the buzzer sets is entirely without foundation. In the letter of July 17, which Mr. Perry wrote the Priorities Section of the War Industries Board, he specifically stated that he needed this building in which to assemble contracts which he then had. The Priorities Section of the Bureau of Aircraft Production sought gratuitously to assist him in getting the material with which to erect this building, upon the theory that it was to the interest of the Government to assist manufacturers in every way possible to fulfill their orders. Petitioner received a distinct benefit from these efforts upon the part of the Government, and this assistance could certainly furnish no basis of claim or liability upon the part of the Government.

3. For the reasons above stated all relief asked for in this case must be denied.

DISPOSITION.

An order will be entered by this Board denying relief.
Col. Delafield and Maj. Farr concurring.

Case No. 1518.

In re CLAIM OF THE FEDDERS MANUFACTURING CO. (INC.).

1. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for \$8,674.27, damages alleged to have been sustained by claimant on the faith of an oral order to manufacture 1,000 tubular radiators for SE-5 airplanes. Held, an informal agreement arose within the purview of the Dent Act, under which claimant is entitled to a fair and equitable adjustment.

Mr. Patterson writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form B, for \$8,674.27, has been filed, said claim being for loss on tubes contracted for by claimant with Trumpbour-Whitehead Brass & Copper Co. (Inc.), upon the faith of the alleged agreement. A supplemental claim for \$10,490.41 for loss upon like tubes similarly contracted for with Standard Stamping & Die Co., was filed by letter on June 17, 1919, with the Claims Board, Air Service. The claim and supplemental claim were referred to this Board by Claims Board, Air Service, July 9, 1919.

FINDINGS OF FACT AND DECISION.

The Board finds the following to be the facts:

I.

At the times hereinafter mentioned Morris W. Kellogg was Second Assistant Director of Aircraft Production and had full authority to negotiate all contracts, subject only to the Director, John D. Ryan, and the First Assistant Director, William C. Potter. J. Gilmore Fletcher was head of the Purchase, Storage, and Traffic Department of the Bureau of Aircraft Production, which had charge of the actual preparation and signing of contracts. H. E. Derbyshire was his assistant. Harold L. Pope was an aeronautical engineer who was employed by Mr. Kellogg or called into conference with him upon matters relating to airplane production.

II.

In July, 1918, the radiator situation was very unsatisfactory. The bureau had been using the core radiator, which had proved inefficient. Representatives of the various foreign missions in Washington recommended the tubular type of radiator, which had met the requirements of the allied armies, especially the British. The bureau's en-

gineers made investigations and discovered that claimant had had experience in the manufacture of tubular radiators for automobiles and had a patent for hexagonal tube radiators, although it had not manufactured such radiators for some time, owing to the expensiveness of such an article. Samples of these radiators were procured from claimant and tests made which gave satisfactory results. Upon the reports of the engineers, Mr. Kellogg requested a conference with a representative of claimant.

III.

A conference took place on June 19, 1918, at Mr. Kellogg's office in Washington, at which were present Mr. Kellogg; L. F. Fedders, president of claimant; Arthur M. Lee, of Trumbour-Whitehead Brass & Copper Co. (Inc.); and Mr. Pope. At this meeting discussion was had as to how long it would take claimant to get into production. None of the witnesses could recall the language used by anyone present, but all agreed that the conclusion was reached that claimant was to receive an order for 1,000 radiators at \$335 each. Fedders stated at this conference that if greater production of radiators was required in a hurry, it would be necessary to place orders for tubes at once. About 3,500 6-inch brass tubes were required for each radiator.

IV.

On the same day a further conference took place between Mr. Fletcher, Mr. Derbyshire, Mr. Fedders, and Mr. Lee relative to an order for radiators. At this conference it was stated by Mr. Fedders that experience had shown there was a 40 per cent loss in expanding five-sixteenths inch circular copper tubes to seven-sixteenths inch hexagonal on each end. At this conference it was agreed that Fedders should be given a verbal order to build 1,000 tubular radiators at not exceeding \$335 each, the first delivery to be made within two months.

V.

It appears from the records of the Air Service that on June 19, 1918 Mr. Fletcher had prepared and signed the following memorandum:

WAR DEPARTMENT,
BUREAU OF AIRCRAFT PRODUCTION,
OFFICE CHIEF OF AIRCRAFT PURCHASES,
119 D Street NW., Washington, D. C., June 19, 1918.

Memorandum for Finance Division, Approvals Section, attention Major Frank E. Smith:

1. In confirmation of agreement arrived at in conference to-day between Mr. Fedders, Mr. Lee, Mr. Fletcher, Mr. Derbyshire, and Major Frank E. Smith, the Fedders Manufacturing Company, Buf-

falo, is to go into production on 2,500 Fedders radiators, De Haviland type, Monogram Brand, tube core.

2. These radiators are to be furnished to plane manufacturers at a price not to exceed \$335 per radiator.

3. It is agreed that the Government has the privilege of using the Fedders' Patents under license upon reasonable royalty.

4. Major Smith is to notify approvals officers in the field regarding the above arrangements.

5. Delivery is to start ten days after receipt of order and necessary specifications, and is to continue at the rate of 100 per week during the first month and 200 per week thereafter.

J. GILMORE FLETCHER,
Chief of Aircraft Purchases.

VI.

It also appears from the records of the Air Service that on June 26, 1918 Mr. Kellogg wrote the claimant the following letter calling attention to the mistake in Mr. Fletcher's memorandum set forth in the foregoing finding:

OFFICE OF THE DIRECTOR OF AIRCRAFT PRODUCTION.

FEDDERS MANUFACTURING COMPANY, *Buffalo, N. Y.*

1. I regret exceedingly to notice in the memorandum of June 19th there was an error made by Mr. Fletcher in stating 2,500 Fedders radiators, DeHaviland type.

2. As I explained to you thoroughly, for this first production. I included an order that you should do your best to obtain from the Curtiss Company for the radiators for the SE-5, of which there will be approximately 1,500. As this radiator is smaller than the DeHaviland radiator, of course the price will be considerably less.

By direction of the Director of Aircraft Production:

Second Assistant Director of Aircraft Production.

Copy to Mr. Fletcher.

VII.

On June 19, 1918 claimant ordered from Trumpbour-Whitehead Brass & Copper Co. (Inc.) 5,000,000 seamless copper tubes at \$45 per thousand, and on June 20, 1918 it ordered from said Trumpbour-Whitehead Brass & Copper Co. (Inc.) 5,000,000 additional tubes at the same price. The latter order was given by the Trumpbour-Whitehead Brass & Copper Co. (Inc.) to Standard Stamping & Die Co., of Brooklyn, N. Y., to fill. It is stated in the notice of claim that Trumpbour-Whitehead Brass & Copper Co. (Inc.) delivered 24,205 tubes on account of the former order; had made up, ready for shipment, 180,933 additional tubes, and had in process 746½ pounds seamless copper tubing for making radiator tubes on said order.

VIII.

No radiators were ever delivered by claimant on account of said order nor was any demand or request made of it by the Bureau of

Aircraft Production for any deliveries under it. Claimant did, however, later receive orders from the bureau for radiators and Trumbour-Whitehead Brass & Copper Co. afterwards furnished tubes to the Government upon order.

CONCLUSIONS.

The evidence, although unsatisfactory in that none of the witnesses could give the exact language used at either of the conferences of June 19, establishes an oral order to claimant to proceed at once with the construction of 1,000 radiators of the tubular type, and claimant is therefore entitled to reimbursement for expenditures shown to have been made by it in reliance thereon.

This Board confines itself, however, to finding that an agreement existed and expressly refrains from passing upon the question of whether claimant has sustained any loss. There was testimony upon the hearing that claimant subsequently received an order or orders for radiators and that the Trumbour-Whitehead Co. furnished tubes similar to those involved in this claim to the Government or to Government contractors or both. The question should be very carefully investigated by the Bureau Board whether any of the tubes for which claimant's commitments were made were used by claimant in any subsequent contract or whether any of them were used by either of the subcontractors in filling subsequent orders.

2. The explanation of the fact that the Bureau of Aircraft Production failed to send claimant a formal contract or to call on it for deliveries under the oral agreement is found in the testimony of the Government witnesses that the price of \$335 per radiator was always considered high and was agreed to very reluctantly; that the radiator situation was constantly changing; that later tests of the Fedders radiator made subsequently to the agreement did not show as high a standard of efficiency as the reports of the earlier tests indicated; and that a new process for "hexing" the tube ends was discovered shortly afterwards by another manufacturer which apparently obviated any necessity for using the Fedders patent.

DECISION AND DISPOSITION.

There was an agreement between the claimant and the United States of America within the purview of the act of March 2, 1919, which can be adjusted, paid, and discharged by the Secretary of War.

This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to Claims Board, Air Service, for action in the manner provided under specification (c), section 5, Supply Circular 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Hunt concurring.

Case No. 756.

In re **CLAIM OF FRED T. LEY & CO. (INC.).**

1. **CONTRACT, CONSTRUCTION OF—AUTOMOBILE.**—Where a cost-plus percentage contract for the construction of a cantonment provides that the contractor shall be reimbursed its actual net expenditures in the performance of the contract as may be approved or ratified by the contracting officer, the cost of an automobile procured at the direction of the constructing quartermaster, who had control and supervision of the construction, comes fairly within the contract terms providing for the reimbursement of the contractor for "facilities necessary for the construction of the camp," where it appears that the automobile was necessary for the use of the Government inspector employed on the work.
2. **CLAIM AND DECISION.**—Claim under General Order 103, appeal from decision of Accounting Section of the Construction Division. Held, claimant entitled to recover.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Accounting Section of the Construction Division on a claim for payment of certain items amounting to \$378.35 on a formally executed contract as hereinafter appears.
2. The case was heard on January 15, 1920, and the claimant was represented at the hearing.
3. Under date of June 11, 1917 the claimant entered into a contract with the Government for the construction at Ayer, Mass., of—"buildings and other utilities, except roads, stoves, bunks, mattresses, ranges, and refrigerators, for an Infantry division," including certain additional units.
4. The cantonment was named Camp Devens. It contained about 10,000 acres. The contract included something over 1,500 buildings, and as many as 9,000 men were at times working on the job. The total expense involved amounted to about \$10,000,000.
5. There were at Camp Devens, either existing or in course of construction, 20 miles of wagon road and about $4\frac{1}{2}$ miles of railroad.
6. The contractor was notified on June 11 that a contract would be given it, and the contract was received and executed about three weeks later.

7. Upon being notified that it would receive a contract the contractor immediately started work.

8. Maj. Edward Canfield, Jr., was the constructing quartermaster at the location at that time, and as such had immediate control and supervision of the construction of the cantonment.

9. Acting under his advice and direction, the claimant purchased a Ford touring car at an expense of \$378.35, for the use of Mr. Lester B. Hunter, who was chief inspector of the auditing department for the Government at the cantonment. Mr. Hunter and Maj. Canfield both testified that the car was necessary for the purpose of enabling Mr. Hunter to cover the wide extent of territory included in the job. The car was delivered to and accepted and retained by the Government.

10. The provisions of the contract relating to what should be done thereunder, are as follows:

"ARTICLE I. *Extent of the work.*—The contractor shall, in the shortest possible time, furnish the labor, material, tools, machinery, equipment, facilities, and supplies and do all things necessary for the construction and completion of the following work, at Ayer, Massachusetts:

"Buildings and other utilities, except roads, stoves, bunks, mattresses, ranges, and refrigerators, for an Infantry division," etc.

DECISION.

1. The expense in question was incurred at the direction of the constructing quartermaster at the camp. We consider that the car was necessary and came fairly within the term "facilities necessary for the construction and completion of the camp." The claimant is entitled to recover the amount which it has expended for this purpose.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Construction Division, War Department, Washington, D. C., for appropriate action.

Col. Delafield and Lieut. Col. Carruth concurring.

Case No. 1921.

In re CLAIM OF FOREST CITY MACHINE & FORGE CO.

1. **CHANGE IN SPECIFICATIONS—REIMBURSEMENT.**—Where the Government by changes in the specifications of a formal contract requires greater expenditures on the part of the contractor than those contemplated in the contract and the contractor complies with the change, an implied contract arises under the act of March 2, 1919, by which the Government agrees to reimburse the contractor such expenditures.
2. **CLAIM AND DECISION.**—This claim for \$4,371.37 arises under the act of March 2, 1919, and grows out of changes in specifications made by the Government and complied with by claimant in the performance of a formal contract. Held, that where specifications of a formal contract are changed in such a way as to increase the expenditures of the contractor that an implied contract arises under which the Government agrees to reimburse the contractor such expenditures.

Mr. Harding writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$4,371.37, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On or about October 2, 1917 the claimant entered into a formal contract, War Ordnance, G. A. 206, dated October 2, 1917, for the manufacture of 2,300,000 Mark I adapter and booster cases. These adapters were for use in the ammunition program of the Ordnance Department. This contract was properly amended by supplemental contract dated April 29, 1918, simply reducing the number of adapters to be made to 1,900,000, and was again amended by a second supplemental contract dated January 18, 1919, reducing the number to 1,789,175, for the purpose only of closing out the formal contract. The contractor had finished its work in the performance thereof and the material thereunder as hereinafter shown to be modified was delivered to the Government, and the amount provided in the original and amended contract to be paid to the claimant was paid.
2. During the performance of the contract and amended contracts and on account of defects in material furnished by the Government

out of which the adapters should be manufactured, the Inspection Division, 8548, Army Ordnance, on or about April 13, 1918, altered the specifications contained in the original contract for the manufacture of the articles set out in the formal contract by sending to the claimant the following telegrams:

APRIL 13TH, 1918.

ARMY INSPECTOR OF ORDNANCE,

Forest City Machine and Forge Co., Cleveland, O.

You will authorize Forest City Company to ream out fuze socket Mark One booster and adapter so interior diameter will be enlarged to point five three two inches plus or minus point naught naught five. Not necessary to thin the bottom of the fuze sockets.

CARLETON,

Inspection Divn., 8537, Army Ordnance.

WASHINGTON, D. C., April 13th, 1918.

ARMY INSPECTOR OF ORDNANCE,

Forest City Mach. and Forge Co., Clevd., O.

Reference inside contour and concentricity gauge for Mark One adapter and booster, you are hereby authorized to utilize fifty per cent of dead space instead of forty per cent as heretofore specified. If Forest City Co. using old fuse sockets inside diameter minimum point five one this will make gauge dimensions point seven nine four for larger part and point five naught seven for small part. However, telegram sent you to-day authorized reaming fuse socket to point five three two plus or minus point naught naught five, and if this is done then gauge dimensions will be point seven nine four for large part and point five one five five for small part.

INSPECTION DIVN., 8548, ARMY ORDNANCE.

These telegrams were communicated to claimant at or about the time of their dates.

The manufacturer complied with the requirements of the inspection division thus sent to it, and all adapters not manufactured before such specifications were altered the claimant delivered to and they were accepted by the Government and paid for at the price fixed in the contract. The claimant claims that by the change in the specifications and by following them it incurred expenses and loss not compensated for, but in which there is included no element of profit, as follows:

Reaming of 1,049,513 52-B brass fuse sockets, at 30 cents per 100----	\$3, 148. 54
Reforming 114,303 52-B brass fuse sockets, at \$3.75 per M-----	428. 64
Cost to cancel 200,000 brass fuse sockets-----	567. 00
Making new plug gauge and new punch for same-----	140. 94
Rebuilding curling dies for sockets-----	86. 25

4, 371. 37

This work was necessary, due to change of drawing on 52-B brass fuse socket, change authorized April 13, 1918.

DECISION.

It has been well settled that where the Government by making changes in the specifications of a formal contract requires a greater expenditure on the part of the contractor than that contemplated in the contract, and the contractor complies with the change in the specifications, an implied contract arises by which the Government agrees to reimburse the contractor for such expenditures; and also if the change in the specifications in the formal contract requires the expenditure of less money than that contemplated by the contract, and the contractor accepts the change and performs the work in accordance with the changed specifications, an implied contract arises by which the contractor agrees to remit to the Government the saving made by him on such contract by reason of the change in the specifications. This well-settled principle is included in the words of the contract itself (Art. V).

2. It is sufficiently clear, from the evidence contained in the files and the evidence produced on the hearing of this case, that the change in the specifications made by the Government, and accepted and complied with by the contractor, caused an expenditure of some amount of money beyond that contemplated in the original contract.

3. The settlement made of the amounts due upon the formal contract and the amendments thereto did not include the settlement upon the implied contract shown by the record in this case to exist, and the implied contract is one to be adjusted under the act of March 2, 1919.

DISPOSITION.

This Board will formulate its document and certificate, Form C, in accordance with this decision, and transmit the same to the Ordnance Claims Board, War Department, for appropriate action.

Col. Delafield and Mr. Diggs concurring.

Case No. 1922.

In re **CLAIM OF FOREST CITY MACHINE & FORGE CO.**

1. **CHANGED SPECIFICATIONS—IMPLIED CONTRACT.**—Where the claimant while manufacturing a quantity of Mark II adapter and booster casings under a formal contract receives instructions from the Government to make such articles according to a new and changed specification submitted, and claimant complies with the instructions and does the work at an additional expense, there arises, under the act of March 2, 1919, an implied agreement to compensate the claimant for the extra expense thereby incurred.
2. **CLAIM AND DECISION.**—This claim arises under the act of March 2, 1919, and is presented upon the theory that the United States Government is obligated to compensate claimant for expenses incurred by reason of the changed specifications in the formal contract. Held, that an implied contract arose under the act of March 2, 1919, to compensate claimant for its extra expenses.

Mr. Harding writing the opinion of the Board.

This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$9,109.02, by reason of an agreement alleged to have been entered into between the claimant and the United States.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. On or about September 16, 1918, the claimant entered into a formal contract, War Ordnance No. P14758-3560A. for the manufacture of 2,000,000 Mark II adapter and booster casings for use in the ammunition program of the Ordnance Department. The Government was to furnish and did furnish the steel tubing from which the Mark II adapter and booster casings were to be manufactured.

2. During the manufacture of these articles it was found at an inspection made by a Government inspector stationed at the claimant's plant that the tubing so furnished by the Government was full of deep grooves, seams, and other roughnesses and irregularities, from which might arise, by reason of friction, an overheating of the T. N. T.,

for which these tubes were to be containers, and that, therefore, they might be a source of danger. The defects in this material were not caused by anything done or suffered to be done by the contractor, but they were original defects in the material. To remedy these defects and to make the articles suitable for the purpose intended, the Government required additional and extra work not contemplated by the contract to be performed on said articles by orders which were accepted by the claimant and performed by it, and upon which it expended sums of money not contemplated in the original contract. These changes were in effect a change in the specifications furnished the claimant for the manufacture of the articles in question in connection with the original formal contract, and the authorizations for the changes are as follows:

CLEVELAND, OHIO, *November 5, 1918.*

From: Army Inspector of Ordnance, Forest City Machine & Forge Company, Cleveland, Ohio.

To: Forest City Machine & Forge Company, Cleveland, Ohio.

Subject: Booster casings—Reaming.

1. Confirming telephone reading, we beg to quote the telegram received by this office:

“Advise Forest City Foundry & Machine Company that booster casings now on hand and in transit can be reamed out at a maximum diameter of one point naught six two five inches. This will be confirmed by letter.”

Army Ordnance, 14316, Engineering Division, Nov. 2d, 1918.

MARION K. EDMUNDS,
*1st Lieut., Ord. Dept., U. S. A.,
Army Inspector of Ordnance.*

CLEVELAND, OHIO, *November 8, 1918.*

From: Army Inspector of Ordnance, Forest City Machine & Forge Co., Cleveland, Ohio.

To: Forest City Machine & Forge Company, Cleveland, Ohio.

Subject: Seamless-drawn tubing for Mark II boosters.

1. You are hereby authorized to ream the tubing which you now have on hand to the diameter not exceeding 1,0625.

MARION K. EDMUNDS,
*1st Lieut., Ord. Dept., U. S. A.,
Army Inspector of Ordnance.*

The claimant manufacturer complied with the requirements of the Inspection Division thus sent to it, and did the extra work required of it by the Government by reason of the changed specifications, and makes its claim for the following expenses and loss on account thereof not compensated for, but in which there is included no element of profit:

Extra operation of reaming 174,261 pieces, Mark II, adapter and booster casings to diameter not exceeding 1.0625:

Total cost—	
128 hours labor-----	\$78. 34
Material-----	86. 65
Reaming operations—	
255½ hours set-up on operation-----	150. 00
1,376 hours time reaming-----	1, 418. 81
620 hours labor or helper time-----	300. 90
620 hours inspector's time-----	272. 80
	<hr/>
	2, 308. 00
Overhead, 100 per cent-----	2, 308. 00
	<hr/>
	\$4, 616. 00
Claim for machining complete, 19,969 pieces, at \$0.225 each-----	4, 493. 02
	<hr/>
	9, 109. 02

The contractor was instructed to proceed with machining operation, and after the completion of this operation final Government inspector rejected 19,969 pieces. The reason for this rejection is that extremely defective material was furnished the contractor and that the parts were deeply scored in no way due to the work performed. The defective material has been inspected by and set aside for the Government.

3. On or about June 2, 1919 a supplemental contract was entered into between the claimant and the Government, settling all matters arising out of the formal contract mentioned in item 1, findings of fact, and terminating that contract. The supplemental contract contains the following provision:

"SECTION 8. The signing of this supplemental contract should not deprive the contractor of his right to proceed in the proper way under the act of March 2, 1919, on its claim for \$9,109.02, representing work performed at the instance of Government officials in the reclamation of booster casings."

DECISION.

1. It has been well settled that where the Government, by making changes in the specifications of a formal contract, or by any requirements, requires a greater expenditure on the part of the contractor than that provided for and contemplated in the contract, and the contractor complies with the change in the specifications or does the extra work required of it, an implied contract arises by which the Government agrees to reimburse the contractor for such expenditures.

2. It is sufficiently clear from the evidence contained in the files and the evidence produced on the hearing of this case that the change in the specifications made by the Government or the extra

work required of the contractor, which changes in specifications or extra work were accepted and complied with by the contractor, caused an expenditure of some sum of money beyond that contemplated in the original contract.

3. The settlement made of the amounts due upon the formal contract, as set forth in findings of fact 3, and by the supplemental contract terminating the same, did not include a settlement upon the implied contract shown by the record in this case to exist, and the implied contract is one to be adjusted under the act of March 2, 1919. It appears beyond question that a settlement of the items claimed in this case were specifically excluded from the settlement in question by the terms of the supplemental contract. The claimant is entitled to recover on this claim for the work done and materials furnished by it, if any, but at a price not to exceed the cost to the claimant, to be ascertained by an audit of the actual work done and the materials furnished and the reasonable cost of the same.

DISPOSITION.

This Board will formulate its document and Certificate Form C in accordance with this decision, and transmit the same to the Ordnance Claims Board, War Department, for appropriate action.

Col. Delafield and Mr. Diggs concurring.

Case No. 2274.

In re CLAIM OF L. WOLFF MANUFACTURING CO.

1. **NEW QUARTERS IN ANTICIPATION OF ORDERS—EXPENSE OF MOVING.**—Where a manufacturer is engaged in the execution of a Government contract for the manufacture of munitions in a certain building, and in anticipation of additional contracts, it moves its plant to a larger building, in the absence of an agreement, express or implied, for reimbursement for the expense of moving its plant, it is not entitled to recover such expense from the Government.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for expense of moving manufacturing plant. Held, no agreement within the act of March 2, 1919.

Mr. Williams writing the opinion of the Board.

FINDING OF FACTS.

This case arises under the act of March 2, 1919. Statement of claim, Form A, under Purchase, Storage and Traffic Division Supply Circular No. 17, was originally filed with the Chicago District Ordnance Claims Board; it was forwarded to the Ordnance Claims Board, at Washington, on October 15, 1919, and by that Board forwarded to this Board on November 26, 1919. The claim grows out of an alleged oral agreement between Maj. R. Hill, Ordnance, and petitioner for certain facilities alleged to have been installed at an expense of \$88,182.78, and must be treated by this Board as a Class B claim under the act of March 2, 1919. The following are the facts in the case:

1. Petitioner, the L. Wolff Manufacturing Co., of Chicago, on February 26, 1918, entered into a written, but proxy-signed, contract, No. P3426-1627A, for 175,000 Mark VII adapters and bushings for gas shells; and on or about the same date entered into a similar contract, No. P2309-1215A, for 500,000 Mark VI adapters. These contracts set out in detail the circumstances under which they may be cancelled by the Government and the method of adjustment and settlement upon cancellation.

2. In ordinary circumstances petitioner would have gone immediately into production of these adapters, but these adapters, unlike most products called for by the Ordnance Department, had never been manufactured by the Ordnance Department, and there were many delays occasioned by changes in design and in specifications, and, as a result of these delays, petitioner did not get into production until about the 1st of August, 1918. It was brought out in evidence that the expense and damage attendant upon these delays and incurred by petitioner has been made an appropriate matter of adjustment under a settlement which is now being negotiated by the Ordnance Claims Board under the terms of the written contracts, and no claim

is before this Board based upon any delays or any changes in design or specifications.

3. Petitioner had a plant at Chicago for the manufacture of the adapters which it had contracted to produce, and, for that purpose, had set apart and fitted up for the purpose of manufacturing these adapters a room containing 9,000 square feet of floor space, which, for the sake of convenience, we will designate as Room A. After the written contracts were made and before petitioner got into production, it is alleged that Maj. R. Hill, who was in the Production Division, Artillery Ammunition Components, by various conversations, beginning about the 1st of March, 1918, and ending about the last of April, urged upon and instructed petitioner to increase and enlarge the facilities which were contemplated for the manufacture of the adapters called for by the two contracts, so that when petitioner did get into production it could produce them in a shorter time than that contemplated in the original contracts, and so that also petitioner would be in position to manufacture further and larger orders of these adapters which, it is alleged, Maj. Hill told petitioner would come through later. Petitioner alleges that, in pursuance of the directions given by Maj. Hill, it made arrangements on or about the 1st of June, 1919, and began tearing out the ovens and other fixtures in another room which it owned across the street, containing about 21,000 square feet of floor space which, for the sake of convenience, we will designate as Room B, and began to fit it up with a cement floor and fixtures for a more rapid manufacture of the adapters, held under contract and to be in shape to manufacture other adapters which were expected to come through from the Government. The expense incurred in moving from Room A to Room B forms the entire basis of the claim as presented to this Board.

4. It is not necessary to go into detail as to petitioner's evidence produced at the hearing of this case. Suffice it to say that petitioner's evidence shows that petitioner had fitted up Room A and was in shape to go into production of the adapters under the written contracts before June 1, 1918; that the move would not have been made solely on the ground that petitioner desired to manufacture the adapters under the written contracts in a shorter time than they could have been manufactured in Room A; and that, as a matter of fact, they were manufactured in Room B in only a slightly less time than they could have been manufactured in Room A. The testimony of petitioner's witness, Mr. H. O. King, is illuminating upon this point. He says as follows (Tr. p. 112):

"Q. In the absence of any hopes or prospects for new and larger orders would you have made that move across the street?

"Mr. KING. I do not think so; no, sir. You see, there is one point I want to bring out here. I am speaking of this not only for the

Wolff Manufacturing Company, but also for my own company, and we were doing Government work. All during the summer of 1918 production officers from Washington here—mostly from Washington, very few from Chicago, visited plants around Chicago and it was the common talk that the war was going to last two or three years. Any such a happening as the war ending on November 11th was never considered. We had that impressed on us. Any number of officers told me that was inside stuff; it was three years; do things on that basis; that the requirements for 1919 from the front were so tremendous that it was hard for any of us human beings to conceive of them. They were going to be something that would make us go four or five times beyond anything that we thought we were then able to do, and it was the whole spirit of the thing that got into all of us from these fellows that came around pushing, that possibly made us not as stable and conservative as we are at this time when we are all calmed down thinking about the thing, you know, in a sort of a theoretical manner, and we were induced to do things at that time a little beyond what good judgment would permit us to do at this time.

“Q. But under those particular circumstances you considered it good judgment to get a larger space in anticipation of larger orders?”

“Mr. KING. Yes, sir.

“Q. That was the controlling factor in your move across the street?”

“Mr. KING. Yes, sir; we wanted to get production on what we did have and get ready for the additional orders from the Government.”

The testimony of Maj. Hill is quite conclusive. Upon his visit to petitioner's plant in April, he says (Tr. p. 119):

“At that time, that date, I gave them no instructions relative to increasing their facilities; knowing the conditions which surrounded the design of these articles, I could not give them any instructions at that time.”

As to Maj. Hill's visit probably in the early part of June, he testified as follows (Tr. p. 125):

“The most important thing did occur in June, because it was in June that I started to take up with them very vigorously their condition, and as you heard the previous testimony to that effect, I got into conference—as demonstrated by my letter there—I got into conference with the Chicago district chief, Capt. Connett, who was detailed by Maj. Arison to follow up the affairs of that plant, and I impressed on the Wolff Manufacturing Company men—that is, Mr. L. Wolff himself—that although the Government's officers had delayed them it was still imperative that they catch up the delinquent part of the contract. They in turn—or at that time I might say, they were in this portion of the plant that you have heard discussed, and it appeared to me then, although I did not say so to them, that to meet or to overhaul the delinquencies and to undertake work that we had in mind that was not expressed to them specifically at that time, that is, in a future program, that it was somewhat inadequate.

It was—it might have been possible to have produced the quantity, but the conditions were such that it would have produced inferior work. However, I did not say anything, but on my next visit they showed me that they had made a change and I expressed approval of it. I gave no orders to make any change there.

“Q. In this visit in June, when you looked over the situation, you say you gave them no orders to make the change?

“Mr. HILL. No, sir; I gave them no orders to make the change, as I reported to Maj. Farr in a sworn statement here. I left that entirely to their discretion.

“Q. Did you discuss that matter with them?

“Mr. HILL. I did not discuss any change at all in June. I only discussed the change, and then very briefly, when the change had been made.

“Q. Before the change was made did they discuss it with you? Did they call your attention to the fact they had this room across the street?

“Mr. HILL. They just briefly told me that there was a possibility they would make a change.

“Q. Did they say why?

“Mr. HILL. It was not very much from the standpoint of—when they first mentioned it to me—of the amount of floor space involved; it was more on account of the conditions there. It was close to the foundry, wasn't it? The light and dirt conditions were absolutely against their proper performance.

“Q. In their old room?

“Mr. HILL. Yes, sir; and I said, as any man would, I realizing they understood their own business best, all right. They didn't ask me specifically shall we make this change? Do you indorse this change?

“Q. And you did not tell them to make it?

“Mr. HILL. I did not tell them to make it.”

DECISION.

1. The claim here presented before this Board is not an appeal from any allowance made by the Ordnance Claims Board under the terms of the cancellation clauses in the written contracts or any circular of the War Department; but the sole question presented to this Board is whether or not the expense incurred in moving from Room A (as hereinbefore described) to Room B (as hereinbefore described), was done under the directions or instructions of any Government agents, or upon or under such circumstances as to create an implied obligation upon the part of the Government to pay for the same. The written contracts for the adapters were entered into the latter part of February, 1918, the move from Room A to Room B was not begun certainly until the first of June, 1918. In the meantime there was considerable delay in getting into production because of the changes in the designs and the plans and specifications by the Government. No item is here claimed on account of that delay or any expense attending it, and it is understood that that is now considered an appropriate matter for adjustment under the

terms of the written contracts which are being adjusted by the Ordnance Claims Board. The evidence clearly shows that no Government officer or agent ever directed petitioner to move from Room A to Room B. The testimony of Maj. Hill is very clear upon that point. Nor was it necessary to move from Room A to Room B in order to manufacture the adapters in the time called for in the written contracts, because petitioner's own evidence shows that they were manufactured in Room B in but very little less time than they could have been manufactured in Room A and the evidence as to the condition and equipment of Room A indicates that the 675,000 adapters could have been manufactured as quickly in Room A as in Room B. It is very plain also that the move from Room A to Room B was not based upon any promise made by any Government officer for other or additional orders for adapters. The testimony shows that not until July, 1918, some time after the move had been made, did Maj. Hill or anybody in the Government service know what the program for adapters for the future would be, and the then existing program was completely covered by existing contracts for adapters. The evidence of petitioner also clearly shows that the move from Room A to Room B would not have been made solely for the purpose of supplying the 675,000 adapters, and the conclusion is very plainly justifiable that the move from Room A to Room B was made merely upon expectation or anticipation of the continuance of the war and the coming through of further and larger orders for adapters. It was the exercise of business judgment under all the circumstances of the case, for which the Government can not be held liable.

2. This Board is therefore of opinion that the change from Room A to Room B was not done in pursuance of any direction or instruction from any officer or agent acting under the authority, direction, or instruction of the Secretary of War, and that the change was not made upon the basis of any promise made by any Government agent to petitioner for further orders of adapters, and that the change was made entirely at petitioner's risk. This Board is not now called upon, however, to express any opinion as to whether or not any of the items claimed for in this move are appropriate matters for payment under the cancellation clauses in the written contracts, and this Board does not express any opinion upon that matter. This decision goes solely to the extent of holding that the move as such is one for which the Government is not responsible or liable.

DISPOSITION.

An order denying relief will be entered by this Board, and a copy of this decision furnished the Claims Board, Ordnance Department, for its information and guidance.

Col. Delafield and Maj. Farr concurring.

Case No. 1201.

In re **CLAIM OF BISHOP & BABCOCK CO.**

1. **SUBCONTRACT—AGENCY.**—Where claimant furnished airplane parts to an airplane manufacturer, believing and understanding the latter to be an agent of the Government, but there is no evidence in the record establishing such agency, an agreement entered into between claimant and such airplane manufacturer is not an agreement within the meaning of the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for turnbuckles and bolts. Held, no agreement within the meaning of the act of March 2, 1919.

Lieut. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACT.

This Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$47,442.01, by reason of an agreement alleged to have been entered into between the claimant and the Curtiss Airplane & Motor Corporation, which claimant alleges it believed to have been a duly authorized agent of the United States Government.

2. It appears from the record in this case that the claimant is a manufacturer of turnbuckles, bolts, and like accessories; that during the war with the German Empire and prior to November 12, 1918, it received at various dates requests by the Curtiss Airplane & Motor Corporation to manufacture certain turnbuckles, bolts, and like accessories. The Curtiss Airplane & Motor Corporation generally furnished the raw materials, specifications, and blue prints, which were to guide the claimant in manufacturing the finished product. These orders were placed with the claimant from time to time by telephone and orally.

3. The claimant has alleged that it was informed by its prime contractor, the Curtiss Airplane & Motor Corporation, and also from various general sources, that the said prime contractor was an authorized agent of the United States Government, and hence was author-

ized to procure supplies necessary for the manufacture of airplanes for the Government. It further alleges that in order to increase production to the capacity desired by its prime contractor, that it purchased special machinery, and increased the capacity of its plant. Special machinery and overages in turnbuckles and bolts, which were ordered by the Curtiss Corporation, constitute the principal items of the claim. There is nothing in the record, however, to indicate that the United States Government knew the claimant as a subcontractor of the Curtiss Airplane & Motor Corporation.

DECISION.

1. The principal question for this Board to determine in this case is whether or not there was a privity of contract between the United States Government and the claimant. The claimant has alleged that it thought that the Curtiss Airplane & Motor Corporation was a duly authorized agent of the United States Government, but has failed to present any evidence to justify this allegation.

2. The record indicates that the Curtiss Airplane & Motor Corporation was engaged in furnishing the United States with airplanes and hydroplanes, and that this claimant was a subcontractor of the said Curtiss Airplane & Motor Corporation, and had all of its dealings directly with said corporation; that it looked entirely to its prime contractor and not the Government for instructions, specifications, and payment for its finished material. It does not appear that the claimant ever had any negotiations with officers or other duly authorized agents of the Government, either with reference to its contracts with its prime contractor or the operation of its plant.

3. The claimant has been given ample opportunity to furnish all of the evidence in its possession bearing upon the principal point at issue in this claim and has failed to establish that there was any contractual relation between it and the United States Government. The Board is, therefore, of the opinion that there was no privity of contract between the claimant and the United States Government, and that the Secretary of War, therefore, under the terms of the Dent Act, is without authority to adjust this claim.

4. For the reason stated, therefore, the relief sought is denied.

DISPOSITION.

1. The Board of Contract Adjustment hereby transmits its decision to the Claims Board, Office of Director of Purchase, for appropriate action.

Col. Delafield and Mr. Van Wagoner concurring.

Case No. 2226.

In re CLAIM OF MARSH MANUFACTURING CO.

1. **FACILITIES.**—Where a manufacturer, operating under a Government contract, incurs expenses in erecting a new factory building and installing new machinery therein, there is no obligation on the Government to reimburse claimant therefor in the absence of an agreement to that effect.
2. **CONTRACT, BREACH OF—WAIVER.**—Where a contractor fails to deliver articles within the time fixed in the contract, but thereafter did deliver a portion thereof, which was accepted by the Government, the breach of the contract as to the time of delivery is waived by the Government.
3. **RE-FORMATION OF CONTRACTS—MISTAKE.**—Where there is no evidence of mutual mistake, a written contract for the manufacture of articles signed by the contractor, though proxy-signed on behalf of the Government, will not be reformed.
4. **MERGER.**—Where it is clear from the Government letter of acceptance that only a qualified acceptance of the contractor's proposal is intended, and afterwards a written contract is entered into, in which the proposal is not embodied, such proposal can not be considered a part of the contract.
5. **CLAIM AND DECISION.**—Appeal from decision of the Claims Board, Office of Director of Purchase. Claim under act of March 2, 1919. Held, claimant entitled to recover for loss on the materials purchased for the purpose of executing the contract.

Lieut. Col. Junkin writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is a Class A claim on appeal from a decision of the Claims Board, Office of Director of Purchase, having come before that Board for review on recommendations made by the Advisory Purchase Board, Jeffersonville, Ind., and the Zone Board of Contract Review for Zone No. 6.

2. On November 15, 1917 the claimant entered into a proxy-signed contract with Col. H. Gray Zalinski, Quartermaster Corps, whereby it was agreed that the claimant should furnish to the Government the following:

Approximately—

	Per M.
3,818,480 tent pins, large-----	\$16. 25
1,087,200 tent pins, small-----	12. 25
5,125,800 tent pins, shelter-----	6. 50

(As per specification requirements and standard sample.)

Delivery: 400,000 tent pins (large or small) and 400,000 shelter tent pins, weekly, commencing Dec. 1, 1917.

Prior to the signing of the contract aforesaid and on October 4, 1917, claimant made a bid by letter to the Depot Quartermaster, Jeffersonville, Ind., containing the following:

"If awards were given us on the above quantities (referring to the tent pins as hereinbefore set forth), we would ask the assistance of the Government to the extent of \$15,000 in advance payment, to be invested in lumber and stored in our yards as a reservation, to be drawn upon in case of railroad failure to deliver, but this reservation to enable us in such failure to maintain the rate of production and maintain the organization necessary to produce this output."

3. On October 13, 1917, the Depot Quartermaster at Jeffersonville, Ind., replied to claimant as follows:

"1. In accordance with your offer, contract is awarded you for furnishing to this corps f. o. b. cars Jeffersonville, Ind.:

Approximately—

	Per thousand.
3,818,480 tent pins, large-----	\$16. 25
1,087,200 tent pins, small-----	12. 25
5,125,800 tent pins, shelter-----	6. 50

"2. Contract will be dated October 15th and numbered '1339'; payments thereunder will be made by the Depot Quartermaster, Jeffersonville, Ind., who will have entire charge of the contract.

"3. (This paragraph explains that claimant must procure a bond, etc.)

"4. Please acknowledge receipt.

"(Signed) H. GRAY ZALINSKI,
"Colonel, Quartermaster Corps,
"Depot Quartermaster."

The first clause of the first paragraph of the foregoing letter is what is relied upon by the claimant as constituting an acceptance by the Government of that part of the proposal of the claimant relative to the advance of \$15,000 on the contract. It is to be noted that only the first clause of the first paragraph of the foregoing letter is quoted by the claimant in its brief.

4. About March 14, 1918 the claimant made application through regular channels for the \$15,000 advance payment on the contract.

5. On June 28, 1918 the War Credits Board notified the claimant that its application for said advance was disapproved.

6. On or about June 13, 1919 Mr. J. L. Klemeyer was appointed receiver of the Marsh Manufacturing Co., and thereupon withdrew the original claim filed by the said Marsh Co. and filed a new one in its stead. This new claim embraced all the items of the original claim, and, in addition thereto, included items predicated upon a breach of contract; that is, the failure of the Government to advance \$15,000 on the contract. The credentials of Mr. Klemeyer as receiver, as presented to this Board, consist of a certificate of the clerk

of, and the seal of, Knox Circuit Court of Knox County, Ind. These credentials do not contain the usual double certificate evidencing a judicial act of a court of another State. Contract No. 1339 was terminated by the Government December 6, 1918. It contained no cancellation clause. The Zone Board of Contract Review for Zone No. 6 recommended that the claimant be reimbursed to the extent of \$1,725 for depreciation in the market value of lumber on hand when the contract was terminated. At a hearing before the Claims Board, Office of Director of Purchase, the other items of this claim were disallowed, but that board intimated that it regarded the item of \$1,725 mentioned above as a just item.

7. The claim as filed by Mr. Klemeyer consists of the following items:

(a) Excess cost of lumber.....	\$33, 258. 42
(b) Traveling expenses.....	979. 33
(c) Timber buyer's expenses.....	1, 151. 17
(d) Cost of new building.....	3, 510. 68
(e) Cost of special equipment.....	2, 129. 22
(f) Cost of removing and relocating machinery.....	1, 616. 13
(g) Loss on lumber on hand Nov. 11, 1918.....	2, 357. 90
(h) Profit estimated on tent pins: 3,064,417 at \$3,290.46, 1,106,700 at \$1,139.96....	4, 430. 42
(i) Loss on U. S. bonds sold at receivership.....	1, 403. 11
(j) Expense of receivership (estimated loss due to receivership).....	10, 300. 00
(k) Expense filing claim, traveling expenses, etc (esti- mated)	450. 00
Total amount of claims.....	61, 586. 38

Items (d), (e), and (f) are based upon the cost of special facilities. Items (g) and (h) should be classed as losses resulting from the termination of the contract. Items (a), (b), (c), (i), and (j) should be classed as items resulting from a breach of contract, while item (k) should be classed as expenses incident to filing of claim, traveling expenses, etc.

8. The contract is silent as to special facilities alleged to have been installed by the claimant, nor was the installation of special facilities otherwise authorized by the Government. The contract is also silent as to an advance of \$15,000 to the contractor.

9. The claimant contends in its brief that there should be a reformation of the contract whereby the alleged agreement of the Government to advance \$15,000 should be read as a part thereof.

10. There was a breach of contract on the part of the claimant, in that it failed to deliver in quantities sufficient to comply with the contract; no shelter-tent pins were ever delivered, yet the Government accepted such deliveries as the claimant made up to the termination of the contract.

DECISION.

1. The questions raised by the facts above stated and to be determined are:

(1) Is the Government obligated to reimburse the claimant the cost of special facilities not authorized by the Government?

(2) Is the claimant entitled to be reimbursed losses resulting from the termination of the contract; when there was a breach of contract on the part of the claimant, in that it failed to deliver in quantities sufficient to comply with the contract, and there was acceptance by the Government of such deliveries as the claimant made?

(3) Was there a breach of contract by reason of the failure of the Government to advance \$15,000 to claimant?

(4) Does this Board recognize the validity of that item of this claim which is based upon expenses in filing claim, traveling expenses, etc.?

(5) Do grounds exist which give rise to a right in the claimant to a reformation of the contract?

(6) Are the credentials presented by Mr. Klemeyer as receiver sufficient to satisfy this Board of his legal authority to take over such amounts as may be allowed under this claim in favor of the Marsh Manufacturing Co.?

2. (1) The installation of special facilities was not authorized by the Government and was not contemplated by the claimant at the time the contract was entered into. In consequence, no obligation rests upon the Government to pay for same. Therefore, items (d), (e), and (f) are disallowed.

(2) The evidence shows that there was a breach of contract by the claimant, in that it failed to deliver in quantities sufficient to comply with the contract; no shelter tent pins were ever delivered, though there was acceptance by the Government, practically to the time of the termination of the contract, of such deliveries of other tent pins as claimant made. It is the opinion of this Board that such acceptance by the Government amounted to a waiver of the breach of contract by the claimant, and that the claimant is entitled to be reimbursed to the extent of \$1,725 under item (g). This amount was previously recommended to be awarded to the claimant by the Zone Board of Contract Review for Zone No. 6 pursuant to Supply Circular No. 111 by reason of the depreciation in the market value of lumber on hand at the time of the termination of the contract. Item (h) being a claim for prospective profits can not be allowed.

(3) The contract as signed by the claimant and Government officers is silent as to all prior and contemporaneous proposals made

by the claimant relative to an advance to it of \$15,000 by the Government.

The claimant contends that the reply of Col. Zalinski, dated October 13, 1917, to its letter dated October 4, 1917, constituted an acceptance by the Government of the proposal of the claimant relative to an advance of \$15,000. It was noted in the findings of fact that the brief of the claimant sets forth only the first clause of the first paragraph of the letter of Col. Zalinski, whereas an examination of the whole-text of this letter shows that Col. Zalinski sets out in detail the things the Government intends to contract for, but is silent as to the advance of \$15,000 to the claimant. This makes it very clear that the acceptance was entirely different from the offer. There was no meeting of the minds and no acceptance relative to the advance of \$15,000. The claimant had its opportunity to refuse the acceptance made by the Government but did not do so, having signed the contract after ample opportunity to understand its terms. The said proposal, not being incorporated in the contract, can not be considered a part thereof, and the refusal of the Government to advance the \$15,000 worked no breach of contract. For reasons stated, items (a), (b), (c), (i), and (j) are disallowed.

(4) The contention in claimant's brief that the insolvency of the claimant was caused by the failure of the United States to advance it \$15,000; and that in consequence the receiver was compelled to make expenditures for traveling and for preparing and filing and presenting its claim to this Board, estimated at \$450, for which therefore it is entitled to reimbursement, can not be sustained. Item (k) is therefore disallowed.

(5) In the absence of mistake mutual to both parties, fraud, or misrepresentation, no grounds exist which give rise to a right in the claimant to a reformation of the contract. There appears no mistake in fact mutual to both parties. The Government did not intend that \$15,000 advance was to be made a part of the contract. The claimant signed and accepted the contract after having understood its terms. If there was a mistake in law mutual to both parties relative to the enforceability by both parties of a proxy-signed contract, same has been cured by the passage of the Dent Act, in so far as the powers of this Board can be applied.

There appears no element of fraud or misrepresentation in the transaction. Therefore, this Board is of the opinion that no grounds exist upon which to reform the contract, and for this reason the contentions of the claimant in this regard are denied.

(6) While the credentials of Mr. Klemeyer are not such proof of a judicial act of a court of Indiana as would compel his recognition by this Board as receiver of said Marsh Co., according to section 9905,

United States Revised Statutes, the sufficiency of his credentials is a matter of discretion with this Board. It is, therefore, the opinion of this Board that the credentials presented by Mr. Klemeyer are sufficient to entitle him to be recognized as the receiver of the Marsh Manufacturing Co.

DISPOSITION.

1. This Board will transmit its decision to the Claims Board, Director of Purchase, for appropriate action in accordance therewith. Col. Delafield and Mr. Shaw concurring.

Case No. 2020.

In re **CLAIM OF EDDYSTONE MUNITIONS CO.**

1. DEMURRAGE—CONSTRUCTION OF CONTRACT—QUASI CONTRACT.—

Where a contract for the manufacture of munitions provides that the Government will furnish certain of the component materials "without cost to the contractor," and that such materials should be consigned to the Government inspector at claimant's plant, but the materials were consigned to claimant direct, and large demurrage charges accrued thereon, which the railroad company charged claimant, and which it was necessary for claimant to pay, claimant is entitled to reimbursement of the sum so paid where such charges did not result from neglect of claimant, because of a quasi contractual obligation raised by the payment by it of a Government obligation.

- 2. CLAIM AND DECISION.—**Claim under act of March 2, 1919, for demurrage. Held, claimant entitled to reimbursement.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. A statement of claim, Form B, was filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$7,918.64, by reason of an agreement alleged to have been entered into between the claimant and the United States.

This is a claim for reimbursement of demurrage charges paid by the claimant to the Philadelphia & Reading Railroad Co. on cars containing Government material shipped to its plant for use on various contracts. At the time these demurrage charges accrued the claimant had a number of munition contracts on which railroad demurrage charges accrued. These contracts are:

GA-105, for the manufacture of shrapnel shells, dated October, 1917.

G1272-699A, for the manufacture of cartridge cases, dated December, 1917.

P2015-1103, for the manufacture of detonators, dated February 28, 1918.

P5094-1941A, for machining of high explosive shells, dated April 1, 1918.

P6187-2093A, for the manufacture of loading fuses, dated April 18, 1918.

P9512-2592A, for the loading and assembling of shrapnel, dated June 18, 1918.

P10729-2773A, for the manufacture of adapters and boosters, dated June 25, 1918.

Each of these contracts contains a provision that the United States shall furnish "without cost to the contractor" some of the component material necessary to complete the contract, which said material shall remain the property of the United States. Under some of these contracts the contractor was to furnish other material, and had entered into an average demurrage agreement on inbound cars with the railroad as follows:

"For the first four days after the elapse of 48 hours' free time beginning at the hour of 7 a. m. after placement, deduct the credit items secured on cars released within 24 hours beginning at the hour of 7 a. m. after placement; the rate shall be \$3.00 per day, excluding Sundays and holidays.

"After four days the rate shall be \$6.00 per day for the next three days, and thereafter \$10.00 per day, including Sundays and holidays."

3. It appears that instructions had been issued that all material furnished by the Government under these seven contracts should be consigned "to the Army Inspector of Ordnance, Eddystone Munitions Company," but that, for reasons undisclosed, the railroad company did not accept goods so consigned, but accepted and billed them direct to the Eddystone Munitions Co. Accordingly, when demurrage charges accrued in large amounts, the railroad company held the claimant responsible for these charges and refused to pay to the claimant a just obligation of over \$10,000 until the claimant company settled with it for the demurrage charges now in question. It was due to these circumstances that the claimant paid the railroad company for demurrage charges for which it now seeks reimbursement. Prior to the transmission of this claim to the Board of Contract Adjustment, it was submitted to the Philadelphia District Ordnance Claims Board and an audit made. The staff report contains the following:

"2. *Summary of contractor's statement of claim.*

"The claim of the contractor is made up as follows:

"Finance Form 8.

"Demurrage charges paid to the Philadelphia & Reading Railroad Company-----	\$7,918.64
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"3. Amount approved by the Cost-Accounting Branch--	6,343.77
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"4. *Reconciliation of differences.*

"The difference between the amount claimed by the contractor and the amount audited and approved by the Cost-Accounting Branch is explained by them as follows:

"When audited it was found that contractor had included charges which were applicable to a contract with the British Government; also contractor had included use of cars for hauling shells from one part of his plant to another after unloading U. S. material, and demurrage on cars which had arrived at plant on commercial

bills of lading with material which the U. S. Government was not interested in; these incorrect charges, together with deduction for war tax, makes a net deduction of \$1,574.87.'

"5. Summary of report of the Claims Staff Branch.

"Whereas, this claim is dependent on the action of the Board of Contract Adjustment, with reference thereto, this claim is submitted to the Philadelphia District Claims Board for transmittal to the Board of Contract Adjustment for such action as they may deem necessary in the premises."

4. At the hearing before the Board of Contract Adjustment inquiry was made whether the accrual of these demurrage charges on material, which was the property of the United States, and which was to be furnished free of cost to the contractor at its plant, was on account of the negligence of the contractor, Eddystone Munitions Co. It appeared from the testimony that the incoming material arrived in great abundance irrespective of the requirements of production, and that a protest was made by the claimant to Maj. James A. Brown, Army Inspector of Ordnance at the plant, as to the rapidity and volume of these shipments. He took the matter up with his superior so that there would not be an overcrowding of the tracks with incoming material that was not yet required. In addition to this there was great congestion of outgoing shipments, due primarily to embargoes placed at different times on points of destination. While there may have been, in some instances, minor neglects of the contractor in unloading cars, which it is now impossible to prove, the evidence does not contain proof of such neglect.

DECISION.

1. Under various munition contracts with the Government, each of which contains the provision that the Government was to furnish certain component material to the contractor at its plant without cost to the contractor, there was received on the tracks near the claimant's plant a large quantity of freight cars containing such materials. Demurrage charges accrued on these shipments which the railroad charged against the claimant on account of goods being billed to the claimant instead of "to the Army Inspector of Ordnance, Eddystone Munitions Company." The claimant has paid the railroad these demurrage charges and now seeks reimbursement.

2. It appears from the evidence that the accrual of these demurrage charges was due primarily to two causes, viz: (a) Volume of incoming shipments greatly exceeded the quantity of material then required by the contractor, and (b) the unloading of incoming cars was hampered by the congestion of outgoing shipments, the causes for which the contractor was not responsible.

3. We do not find from the evidence that there is proof of negligence on the part of the claimant in not unloading cars on which the demurrage accrued, and which contained Government material which the Government had obligated itself to furnish "free of cost" to the contractor.

4. Owing to the fact that the claimant was required by the railroad company to pay demurrage charges on material which the Government had obligated itself to furnish "free of cost to the claimant," and as there is no negligence shown, there arises an implied obligation on the part of the Government to reimburse the claimant the demurrage charges it has paid.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms, and conditions of the agreement and Certificate C to the Claims Board, Ordnance Department, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Maj. Taylor concurring.

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Case No. 2186.

In re CLAIM OF PERKINS GLUE CO.

1. **EXPENDITURES IN ANTICIPATION OF CONTRACT.**—Where claimant developed a waterproof glue satisfactory to the Government after experiments conducted, in part, in connection with and under the direction of representatives of the War Department, and relying upon statements of representatives of the War Department that large quantities of such glue would be required in the production of airplanes, incurred expenses in experimenting and developing the glue and for special equipment for its manufacture, and manufactured a quantity thereof, which it had on hand at the time of the armistice, claimant is not entitled to reimbursement in the absence of an agreement express or implied.
2. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for experimental and development expenses, special equipment, and damages on account of the Government failing to issue a purchase order. Held, claimant not entitled to recover.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1918. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division, Supply Circular No. 17, 1919, for \$17,168.57, by reason of an agreement alleged to have been entered into between claimant and the United States.

2. The claim was referred to this Board by Claims Board Air Service.

The relief demanded is as follows:

For actual cost to claimant of 245 100-lb. barrels of caseln water-proof glue manufactured and undisposed of at time of armistice—	\$11, 331. 13
For experimental and development expenses—	4, 992. 61
For special equipment:	
Cost of machinery—	\$2, 044. 83
Appraised value—	1, 200. 00
	<hr/>
	844. 83
Total—	<hr/>
	17, 168. 57

3. In the fall of 1917 a demand for waterproof glue was created through the need for such a product in the manufacture of airplanes. The United States Government, acting through the Forest Products Laboratory at Madison, Wis., tested out many commercial glues without finding any which proved wholly satisfactory. Accordingly a

series of experiments were commenced with a view to developing a glue that would be both strong and waterproof. The claimants took great interest in the tests conducted at the Forest Products Laboratory, furnished samples of their own glue, and offered to send a representative to assist in these tests and furnished the Forest Products Laboratory with information relative to an alleged waterproof glue made in Vienna.

4. On April 2, 1918, claimant entered into a written agreement with Carlisle P. Winslow, Director of Forest Products Laboratory, which reads in part as follows:

"The Forest Products Laboratory agrees to furnish the Perkins Glue Company with formulas for the manufacture of waterproof casein glues and other information as it desires; provided that, however, in consideration of furnishing this information the Perkins Glue Company agrees that it will not apply for patents covering any of these formulas for casein glue that are furnished in writing to it by the Forest Products Laboratory * * *. It is agreed that the Forest Products Laboratory assumes no financial responsibility for any expense which the Perkins Glue Company may assume in developing glues or using information furnished by the Forest Products Laboratory * * *."

5. The Government's motive in entering into the above agreement was the desire to develop a waterproof glue to be purchased and used by the manufacturers of airplanes. The claimant's motive is revealed in a letter of March 22, 1918, written to Mr. Stryker, president of said company, by the vice president, Gertrude Perkins, in which the following appears:

"* * * I imagine if we do not take up proposition it may be offered National Process. Our conference developed no intimation we would not be free to sell where we like and no remuneration mentioned for Madison information given us. The gist of talk, however, was all on lines of our furnishing glue to our panel customers for war work. * * * Have gone over proposition with Harry and we three think best plan is for you and Grosvenor come here and go with us to Madison to determine first whether in our opinion commercially successful waterproof glue could be manufactured according to their formula. Second, if so whether we would be warranted in making our investment required to produce and manufacture at a profit * * *."

6. The above is confirmed by Mr. Stryker in letter of April 6, 1918, to Mr. Winslow, Director of the Forest Products Laboratory.

"* * * We do not wish to lay claim to any excess of patriotism, but we do wish to say that we have two chief objects in our endeavor to go into this waterproof glue business. * * * First: If the Government needs a waterproof glue, we will assist in its production if possible. Second: Our wood-working trade wants us to

sell them a waterproof glue if it is to be had; we should fill these two requirements."

7. It appears that the claimant proceeded to make experiments with a view to producing a waterproof glue and eventually produced a mixture which proved very satisfactory under Government tests. In the course of perfecting this product considerable correspondence was carried on with various officers in the office of the Director of Aircraft Production. This correspondence pertains chiefly to the results of various tests made, suggestions as to the effect of certain chemicals, and requests for statements as to the progress being made by the claimant in the development of a waterproof glue. The correspondence shows a desire on the part of the Government to lend assistance in the claimant's work and a willingness on the part of the claimant to cooperate with the Government. Nothing is found, however, which indicates that the Government at any time agreed to purchase the claimant's output or assume the expense of the experimental work.

8. Upon the conclusion of hostilities the claimant had made expenditures and installed equipment incidental to their experimental work and had on hand the waterproof glue for which claim is here made. This glue had been inspected and sealed by the Government and was ready for delivery, but the suspension of activity in the production of airplanes curtailed the market for claimant's product with the result that claimants have been unable to dispose of it.

DECISION.

1. The expenditures which are the subject of this claim were made by the Perkins Glue Co. wholly at its own risk. The United States Government at no time agreed to purchase the glue in question and at no time agreed to reimburse the claimant the expenses incurred in making the experiments for which claim is now made. Accordingly, the United States is under no contractual obligation to the claimant, and the relief demanded is denied.

Col. Delfield and Mr. Fowler concurring.

Case No. 2395.

In re CLAIM OF R. M. MESSICK & SONS.

1. **FOOD ADMINISTRATION BULLETIN—SALES—PROVISIONAL PRICE.**—Where a purchase order for tomatoes fixes a provisional price, and the tomatoes are delivered to, accepted, and paid for by the Government at the provisional price, and a Food Administration bulletin provides that the tomatoes so accepted will be paid for in full at zone prices fixed by the Food Purchase Board, and that if the packer is dissatisfied, he may protest the same, and be paid at the actual cost of production, to be ascertained by the Federal Trade Commission, plus a fair profit to be fixed by the Food Purchase Board, the bulletin furnishes the proper rule under which an adjustment of the final price should be made.
2. **SALES—PROVISIONAL PRICE—RECEIPT—DURESS.**—Where under the circumstances stated in Syllabus No. 1 the packer protests the zone price, and under the terms of the bulletin the packer is allowed and paid an additional sum, and signs a receipt reciting payment in full, and thereafter claims the receipt was signed under duress, of which there is no evidence, and claims that the settlement was arrived at by computation on an erroneous basis, of which basis he had full knowledge when he signed the receipt, claimant is not entitled to have the settlement reopened.
3. **FOOD ADMINISTRATION BULLETIN—STORAGE.**—Where a Food Administration bulletin provides an allowance for storage on tomatoes not ordered shipped before December 1, 1918, and claimant received shipping order November 1, 1918, claimant is not entitled to reimbursement of storage charges although the purchase order was not issued as early as claimant anticipated.
4. **CLAIM AND DECISION.**—Claim under act of March 2, 1919, for additional compensation for tomatoes and for storage and interest. Held, claimant not entitled to recover.

Mr. Howe writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form A, has been filed and the claim comes to this Board on appeal from decision of the Claims Board, Office of Director of Purchase.

The claim is for \$1,650.58, based on an informally executed contract alleged to have been entered into between the claimants and the Quartermaster Corps of the War Department, and is made up of the following three items:

\$1,282.50 being the difference between the price paid to the claimants in settlement for shipments of canned tomatoes made under a purchase order pursuant to the action of the Food Purchase Board, and a higher price to which claimants consider themselves entitled under the Food Purchase Board rules.

\$320 for storage of the tomatoes on claimants' premises from December 1, 1918, to January 1, 1919, alleged to have been caused by delay in the receipt of the purchase order.

\$48.08 interest on the above two amounts.

A hearing of the claim was held on February 10, 1920.

STATEMENT OF FACTS.

1. Claimants are a copartnership, engaged in the business of packing tomatoes at Bethlehem, Md., which is in the Baltimore Quartermaster Zone.

2. On August 1, 1918 claimants received written notice from the depot quartermaster, United States Army, Baltimore, Md., to the effect that the Food Administration had allotted to the United States Army 33 $\frac{1}{3}$ per cent of claimants' 1918 pack of tomatoes, and that purchase orders for so much thereof as the Army required would be issued promptly to claimants on receipt of notice from claimants as to whether they wished inspection at the factory or elsewhere. Claimants immediately complied with this request by sending notice that they wished factory inspection. Factory inspection appears, however, to have been later waived by the Government.

3. It also appears that about the same time, or prior thereto, claimants had received and were familiar with the various bulletins of the United States Food Administration, stating the terms and regulations in accordance with which tomatoes were to be packed, shipped, and paid for by the Army.

4. In accordance with the instructions of August 1, 1919, claimants reserved for the use of the Army the required percentage of their pack, and on October 9, 1918, they received from the depot quartermaster at Baltimore a purchase order covering 9,000 cases of 2 dozen cans each of No. 3 tomatoes at a provisional price of \$1.85 per dozen cans. This purchase order was proxy signed.

5. Claimants, about the same time, were notified by the quartermaster to make no shipments until receipt of transportation orders.

6. Transportation orders reached them November 1, 1918.

7. On receipt of these orders claimants started shipments on or about December 17, 1918, and during December, 1918, and January and February, 1919, shipped the entire amount of 9,000 cases covered by the purchase order. These 9,000 cases were accepted and claimants were paid by the quartermaster the provisional price of \$1.85 per dozen cans, as shipments were made.

8. It was provided in Food Administration Bulletin No. 13 that tomatoes accepted by the Government would be finally paid for in full at the zone price fixed by the Food Purchase Board for the particular zone in which the packer was situated, and further that

if the packer was dissatisfied with this zone price he was at liberty to protest the same, and to be paid at the actual cost of production, to be ascertained by the Federal Trade Commission, plus a fair profit to be fixed by the Food Purchase Board.

9. Claimants, after making all the shipments, were offered by the Baltimore quartermaster the Baltimore zone price, which was \$1.95 per dozen cans. Claimants thereupon protested this price and asked to have their final price fixed in accordance with Bulletin No. 13. Accordingly the Federal Trade Commission investigated and determined claimants' production cost at \$1.75. To this cost was added the profit allowed to packers selling to the Army under the Food Purchase Board's rules then in force, of 21 cents per dozen, making the total final price to be allowed claimants of \$1.96 per dozen cans.

10. Claimants were finally paid at the rate of \$1.96 per dozen for the 9,000 cases delivered. Payment was made to them by paying them the difference between the sum due them on the basis of \$1.96 per dozen and the provisional price of \$1.85 per dozen, previously paid. This resulted in delivery to claimants of a check for \$2,366.90, which they accepted and upon receipt of which claimants signed a voucher setting forth the basis on which this amount was computed and bearing the following statement: "I accept settlement on the above account as payment in full for the commodity furnished."

11. Claimants' contention now is:

First. That they are not bound by the terms of the receipt which they signed, because it was signed under duress and that, not being bound by it, they are entitled to have their compensation computed on a different basis. They claim that the profit allowed by the Federal Trade Commission on Army tomatoes of 21 cents is predicated on a production cost based on a 2-pound can (which is the standard weight can in general use), whereas the cans actually delivered by the claimants weighed 2 pounds 1½ ounces each. Claimants ask an increase in the cost on which profit is to be allowed them proportioned to this difference in weight.

Second. That no allowance has been made them for storage. They claim storage on the tomatoes on hand and undelivered after December 1, 1918, on the ground that their failure to deliver them sooner was due to the delay of the Government in not sending them the purchase order before October 9.

DECISION.

1. As to the claim for a higher production-cost basis, it appears clearly from the testimony that no matter what sized can the cost basis for the Army profit was based on, as a matter of fact the calculation of cost in this case, which was made at the claimants' own re-

quest, was based on the actual cans which they were packing and which they, in fact, delivered and have been paid for, and that this was done and payment accepted by claimants with full knowledge of the basis on which the cost was computed. There is, moreover, no evidence to show that claimants signed the receipt above set forth under any duress forming a legal basis for regarding the receipt as not binding on claimants. All that appears is that they accepted payment and signed the receipt because they were in need of working capital and concluded it would be good business judgment to do so, and not for any reason in any way imputable to the Government. There seems, therefore, no reason for holding that claimants have not been compensated in accordance with their contract, or are entitled to higher price than they have received in payment for the goods delivered under it.

2. Nor does there seem any ground for allowing the claim for storage. The Food Administration bulletins applicable in this case provide that storage is to be allowed only on tomatoes not ordered shipped prior to December 1, 1918. Claimants received shipping orders on November 1, 1918. They made their first shipment about December 17, but their contention that this delay was due to the fault of the Government in not issuing the purchase order before October 9 is not sufficiently established to justify the application of any other rule than the requirements of the bulletin itself.

3. In view of the foregoing, there is no basis for the allowance of interest on the amounts claimed.

DISPOSITION.

1. The claim should be denied.

Col. Delafield and Maj. Hope concurring.

Case No. 1586.

In re **RECLAIM OF THE TILTON OPTICAL CO.**

- 1. FACILITIES—IN ANTICIPATION OF ORDERS.**—Where a plant was erected in anticipation of Government orders but not in pursuance of any agreement providing for amortization, claimant is not entitled to reimbursement on account of the erection of the plant.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for that part of the cost of erecting a plant under war conditions which was in excess of what it would have cost in normal times. Held, claimant is not entitled to relief.

Mr. Patterson writing the opinion of the Board.

This case arises under the act of March 2, 1919. It appears to be a Class B claim, although the statement was presented to Boston District Claims Board, Ordnance Department, upon Form A. The claim was referred to this Board by Claims Board, Ordnance Department, July 16, 1919.

DECISION.

The amount claimed is \$16,330, representing the cost of erecting a building at claimant's plant at Tilton, N. H., under war conditions, in excess of what the same or a similar building would have cost in normal times. It is asserted that claimant entered upon the construction of the building when it did upon the faith of representations by Government officials that it would receive contracts which would enable it to amortize the cost.

Briefly stated, the facts established are as follows:

Claimant, Tilton Optical Co., manufactures optical lenses. It has been financed for a number of years by Martin-Copeland Co., of Providence, R. I., which controls a majority of its voting stock and makes the frames for its lenses and markets the assembled product. The Martin-Copeland Co. at the beginning of the war was in a flourishing condition and at the end of its fiscal year, July, 1918, had orders on its books sufficient to occupy the facilities of its own plant and that of claimant for some 18 months at higher prices than it had ever received for its products.

From motives of patriotism, Mr. Laurence C. Martin, vice president of the Martin-Copeland Co., realizing that the Government was in great need of high-class optical materials, solicited Government contracts and received a number for lenses for deep-trench periscopes, aviators' goggles, telescopic gun sights, and other devices.

During the summer and autumn of 1917 all of the facilities of claimant and of the Martin-Copeland Co. which were in any way available or adaptable for Government work were devoted to these contracts.

A certain Lieut. A. B. Gardner, who appears to have had something to do with the procurement of optical instruments for the Army, directed Mr. Martin's attention to the demand for an instrument called the "sitogoniometer," which the French artillery had found of great value for fire-control purposes. Lieut. Gardner stated to Mr. Martin that the Army would readily find use for at least 100,000 of these instruments as soon as they could be procured.

Mr. Martin proceeded to Washington and conferred with George E. Chatillon, Chief of the Military Optical Glass Section of the War Industries Board. Mr. Chatillon indorsed Lieut. Gardner's statements respecting the sitogoniometer and encouraged Mr. Martin to develop the facilities of his companies for the production in quantity of these instruments and of optical glass for instruments of precision generally.

Mr. Martin informed Lieut. Gardner that his existing facilities would not permit the production of any such quantity of sitogoniometers as discussed without an additional building at the Tilton plant. He expressed his willingness to erect such a building if the necessary priority orders could be obtained to enable him to procure the material and its delivery at Tilton. The subject of governmental financial assistance was discussed, but such assistance was declined by Mr. Martin. Mr. Chatillon introduced Mr. Martin to the Priorities Committee and assisted him in obtaining from that committee the necessary orders and also in obtaining blue prints for the equipment for the new building from the Naval Gun Factory at Rochester, N. Y. The erection of the building was begun and was in progress when the armistice was signed. Claimant being committed for the material and construction, proceeded with the latter, and the building was completed about March, 1919, and is now in use.

It is clear, however, from the testimony of claimant's witnesses that the building was not required for purposes of its ordinary trade and would not have been erected up to the present time (certainly not during the war) had it not been for the expectation of large contracts for sitogoniometers and other Government work.

Claimant or the Martin-Copeland Co. did receive orders for sitogoniometers from time to time and manufactured in all about 4,900 of them. These orders appear to have been adjusted; at any rate, they are not involved in the present claim.

Nothing is found in the case as presented by claimant to sustain a finding that there was any agreement between the claimant and any

person representing the Secretary of War or the President of the United States upon which this Board can recommend any relief. No promise by anyone has been proved that the Government would reimburse claimant the cost of the addition to its plant or for any part thereof, nor was there any order or direction to proceed with its construction or any suggestion of compulsion from which an agreement can be implied. While Mr. Chatillon undoubtedly encouraged Mr. Martin in his plan, even to the extent of assisting him in procuring priority orders for materials, which he probably could not have obtained without such assistance, it is clear that whatever risk was connected with the transaction through a possible cessation of hostilities was assumed by claimant.

Mr. Martin's attitude throughout has been most patriotic and commendable, but Congress has not authorized the Secretary of War to reimburse him for his efforts to serve his country.

This Board will therefore enter the usual final order denying relief.

Col. Delafield and Mr. Bowen concurring.

Cases Nos. 1475 and 1647.

In re CLAIMS OF SPENCER LENS CO.

1. **STIMULATION OF PRODUCTION.**—A strong representation of Government needs by a representative of the War Industries Board, accompanied by advice to lay in sufficient supplies for the manufacture of glass to last through the winter of 1918-19, does not constitute an agreement within the purview of the act of March 2, 1919, to reimburse the claimant expenditures made in anticipation of future orders.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an implied agreement with the War Industries Board in relation to the production of optical glass. Relief denied.

Lieut. Col. Carruth writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. These cases arise under the act of March 2, 1919. Statements of claim, Form B, have been filed under Purchase, Storage and Traffic Division Supply Circular No. 17 (1919) for \$12,135.50, less \$2,224 for salvage, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claimant alleges that in April, 1918, it was instructed by Dr. Arthur L. Day, in charge of the production of optical glass of the War Industries Board, to provide a sufficient number of pots before November to carry its glass production at full capacity through the winter of 1918-19, and that acting upon these instructions it placed orders for large numbers of pots with the Willetts Co. and the La Clede-Christy Clay Products Co., the subcontractors of the claimant. These claims are for the pots which claimant alleges were over and above the quantity required in the full performance of its formal contract with the Government and were secured for this contract and in anticipation of future orders to keep its plant going at full capacity throughout the winter of 1918-19 and into the following spring.

3. It appears from the testimony adduced at the hearing of these cases that the claimant was a manufacturer of optical glass and instruments for using said glass; that there was a great demand by the Government for its products during the year 1918; that in April, 1918, the claimant, by its president, Mr. H. N. Ott, had a conversation with Dr. Day, who outlined to him the possible needs of the Government and advised him to stock its plant with sufficient pots

and other materials to keep it running at full capacity during the winter of 1918-19 and up to March 1, 1919. It does not appear that the claimant was given any definite promise of orders.

4. The claimant received a formal order from the Government through the office of the Chief Signal Officer for 70,000 pounds of optical glass the latter part of April or the first of May. The order, which was dated April 5, 1918, and the formal contract, dated April 11, 1918, did not provide any specific date upon which delivery was to be completed, but it was understood that the contractor was to proceed with all possible haste to fulfill said contract.

5. Mr. H. N. Ott, president of the claimant company, testified at the hearing in substance as follows: That the greatest difficulty was in getting pots on account of freight conditions; that it looked very much during the spring and summer months of 1918 that freight conditions were going to be worse during the winter of 1918-19 than they were in 1917-18. He was so very anxious about getting a sufficient number of pots and chemicals for carrying on his work that Dr. Day very kindly put his shoulder back of the proposition and through his agency and the agency of the Geophysical Laboratory he was able to interest the La Clede-Christy Co. particularly in making enough pots for him; that he saw he was going to need so many pots to make so much glass; that he would need so many more pots to carry him through the winter, irrespective of any particular order, expecting to use as many pots as was necessary on those individual orders and anticipated orders; that he did not know at the time that he was ordering 332 pots over and above the other orders, because he did not specially figure out just how many pots each particular order would take, but knew that he could fill the order before the winter was over and knew that the Government departments would want all the glass he could make; that the Aircraft said that they would need more glass than the 70,000 pounds; that he wanted to be sure he had enough pots to take care of his needs during the winter, he used the pots and as he saw he could use more pots he ordered them; that he was led to believe by Dr. Day, of the War Industries Board, that the entire capacity of his plant would be required by the Government; that while he had a formal contract with the Government and had only completed about 25 per cent of it when the armistice was signed, yet he believed that if he had been permitted to continue the performance of said contract, on account of the rapidly increasing capacity of his plant, he would have completed said contract by January 1, 1919. Mr. Ott testified further that officials of the Rochester District Ordnance Office constantly urged the claimant company to increase its capacity and were anxious for him to get the Aircraft order out of the way as

quickly as possible so that they might place some orders with him; that he delivered optical glass and instruments for using optical glass to the Navy Department, which was charged against his formal contract with the Signal Corps; that his factory delivered finished optical instruments to the Ordnance Department; that Dr. Day had acted as his agent in placing an order for pots; that the Government had settled with the claimant for the cancelled contract. Mr. Ott admitted, however, that all of his negotiations for orders had been carried on with the Signal Corps; that he knew contracts would be placed by the various departments of the War Department and not by the War Industries Board.

6. Dr. Day testified that he advised the claimant to have a sufficient supply of pots on hand by November 15, 1918 for the capacity of its plants for the winter of 1918-19, up to the first of March, 1919; that there was a tremendous demand for the products of claimant's plant and that the Government would have required a far greater amount of the products in question than the claimant's and other plants could have produced had the armistice not been signed. He also said that he did not have authority to make purchases, to sign contracts, or even to negotiate contracts, but that his duty was to boost production and to assist the manufacturers in every possible way to obtain the maximum production, and that he did not at any time intend to lead claimant to believe that he had authority to place orders or to incur financial obligations. Dr. Day further testified that his function was largely technical; that he did not attempt to indicate the quantity of raw materials that should be ordered, but only outlined in a general way the possible requirements of the Government and left it to the discretion of the claimant to make its own contracts and to place its orders for raw materials.

DECISION.

1. From the above statement of facts it is clear that the claimant purchased the pots, not upon the faith of an agreement with an agent or officer of the Government, but upon the advice of Dr. Day that it would be good business judgment to have a sufficient supply of pots and other materials in stock to keep it going at full capacity during the winter of 1918-19 and the early spring of 1919, in order to avoid a repetition of the failure of the claimant during the previous winter to obtain sufficient pots on account of freight congestion.

2. The president of the claimant company testified that he saw he was going to use so many pots to make so much glass; that he would need so many more pots to carry him through the winter, irrespective of any particular order; that he wanted to be sure he had enough pots to take care of him during the winter, and that as he used pots and as he saw he could use more pots he ordered them.

3. The claimant does not allege and the record or testimony does not disclose that the claimant was promised any contracts, but at the hearing the president of claimant company testified that subsequent to his conversation with Dr. Day in April, 1918, it received a contract from the Chief Signal Officer for 70,000 pounds of glass, and that only 25 per cent of said glass was delivered up to November 15, 1918, when the contract was cancelled.

4. It was the principal function of Dr. Day to assist the manufacturers of optical glass in every way possible to obtain the maximum production to meet the requirements of the Government. Dr. Day testified that he did not have authority to negotiate contracts, to sign contracts, or to make purchases, and did not at any time intend to lead claimant to believe he had authority to place orders or to authorize claimant to incur financial obligations. The records show that Dr. Day acted as the agent of the claimant on one occasion in placing an order for pots with one of claimant's subcontractors.

5. It has been several times decided by the Board that the acts of the agents or officers of the Government in urging increased production to meet the growing requirements of the Government do not create an agreement within the meaning of the act of March 2, 1919, to reimburse contractors for obligations incurred or expenditures made in anticipation of a contract.

6. The Board is of the opinion that the surplus pots for which these claims are made were ordered by the claimant to be used in the performance of its formal contract with the Signal Corps and in anticipation of future orders from the Government and not upon the faith of any agreement entered into by any officer or agent of the Secretary of War or of the President within the meaning of the act of March 2, 1919.

7. For the reasons stated, therefore, the relife sought is denied.
Col. Delafield and Mr. Van Wagoner concurring.

Case No. 1504.

In re **CLAIM OF DENBY MOTOR TRUCK CO.**

1. **AMORTIZATION OF FACILITIES.**—Where facilities were not specifically provided by the contractor for the performance of the contract and there was no express or implied agreement by the Government providing for their amortization, claimant is not entitled to reimbursement therefor or to the unabsorbed amortization thereon, under the act of March 2, 1919.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a written contract for motor trucks. Relief denied.

Mr. McCandless writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This case arises under the act of March 2, 1919. Statement of claim, Form B, has been filed under Purchase, Storage and Traffic Division Supply Circular No. 17, 1919, for \$82,500, by reason of an agreement alleged to have been entered into between the claimant and the United States.

2. The claim was forwarded to this Board from Claims Board, Director of Purchase, upon the grounds that—

“It appears from an examination of the claims that there is no written evidence submitted showing the nature, terms and conditions of the alleged contract.”

3. The relief demanded in the petition is for amortization of plant and facilities under two alleged contracts, designated as No. 704 and 780. Upon the hearing, the Denby Motor Truck Co. withdrew its claim under No. 780 and thus reduced the amount demanded to \$75,000, all of which is claimed under No. 704.

4. From the testimony it appears that in January, 1918, the Denby Motor Truck Co. entered upon a program of plant enlargement. At this time it was the expectation of the company's officials to secure Government contracts and thus recoup their expenditures.

5. It appears that in July, 1918, bids were submitted upon a competitive basis for the manufacture of Class B trucks. Mr. G. W. Burch, auditor of claimant company, testified that in preparing the bid of the Denby Motor Truck Co. an item of \$50 per truck was added into the bid price to cover amortization. It was not alleged, and there is no evidence, that any Government official knew that the

bid price was composed of various items, one of which was for amortization.

6. No oral agreement providing for amortization was entered into between the claimant and the Government's negotiating officers. On the contrary, the president of the claimant company told Col. E. S. George and Maj. A. B. Browne that the Denby Motor Truck Co. was completely equipped to fill an order for 1,500 Class B trucks, and this was one of Col. George's reasons for placing the Denby Motor Truck Co. on the list of successful bidders.

7. On October 2, 1918, claimant received the following letter (claimant's Exhibit 3):

OCTOBER 2, 1918.

451.2-MT.

The Quartermaster General.
Denby Motor Truck Co.
Award on "B" trucks.

1. In connection with bids which you filed on furnishing the "B" trucks, it is advised that you have been awarded a contract for 1,500 at \$1,132.57 each; you to furnish all the material for assembling of this truck, as per specifications, with exception of the so-called 11 major units:

* * * * *

2. All the above in accordance with specifications, drawings, and blue prints which are furnished by the Government. Formal contract will follow later.

By authority of the Acting Quartermaster General.

Advise acceptance.

EDWIN S. GEORGE,
Colonel, A. S., A. P., Attached to Q. M. Corps.

8. On October 16, 1918, claimant was informed as follows:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER GENERAL,
Washington, October 16, 1918.

From: Motors & Vehicles Division, Q. M. C.
To: Denby Motor Truck Company, Detroit, Mich.
Subject: Furnishing Class "B" motor trucks.

1. You are advised that Order No. 704 will cover 1,500 Class "B" chassis to be furnished by you at \$1,132.37.

By authority of the Acting Quartermaster General.

(Signed) A. H. ZACHARIAS,
Major, Q. M. C.

9. On November 14, 1918, production was suspended and as a result no formal contract was ever signed and no trucks were manufactured or delivered.

10. The Claims Board, Director of Purchase, on May 16, 1919, entered into a settlement agreement No. P. C. 167, covering contract

No. 704, and claimant was allowed the sum of \$5,255, made up as follows:

Net obligations of subcontractors.....	\$3,842.92
Subcontractors' materials to which United States Government takes title.....	1,053.06
Miscellaneous claims.....	1,412.08

DECISION.

1. The plant and facilities were not "specially provided and paid for by the contractor for the performance of the contract" (S. C. 111-3-(4)) designed as No. 704; nor did the United States, through its officers or agents, enter into any agreement, express or implied, providing for the amortization of claimant's plant and facilities. Accordingly the relief demanded by the Denby Motor Truck Co. is denied.

Col. Delafield and Mr. Fowler concurring.

Case No. 2370.

In re CLAIM OF LEO H. HIRSCH & CO.

1. **EXPENSE OF RESELLING—BREACH.**—Where a contractor manufactured the goods ordered by the Government but the latter refused to take them on account of the armistice, whereupon the contractor sold them to private dealers for the same price as the Government had agreed to pay, claimant is entitled to its actual reselling costs. Stated in another way, claimant is entitled to the difference between the contract price and the fair value of the goods, which fair value is the price realized less the actual cost of reselling the goods.
2. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an oral contract for buttons. Held, claimant is entitled to relief.

Lieut. Col. McKeeby writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. The claim comes to the Board of Contract Adjustment on appeal from the Claims Board, Office of the Director of Purchase, as a Class B claim under the act of March 2, 1919.

2. On November 6, 1918, Capt. R. H. Harris, Quartermaster Corps, Procurement Division, New York Zone Supply Office, orally awarded to the claimant an order for 5,000 gross 20-ligne, fresh-water pearl, four-hole buttons at 45 cents per gross, delivery to be completed November 16, 1918, and instructed claimant to proceed at once with the order, and that a formally drawn order would follow. No written order issued.

3. In pursuance of this order claimant proceeded to manufacture the 5,000 gross of buttons and was prepared to deliver same to the Government, but hostilities having ceased the goods were not desired, and claimant later sold same on the market at 45 cents per gross.

4. The claimant, being unable to sell the entire lot to any one purchaser, was compelled to seek purchasers, and finally succeeded in disposing of the entire lot to various purchasers.

5. The claimant alleges that by reason of the Government not taking the goods it was put to the following expenses:

Item No. 1. Replacement of raw materials used, 8,000 gross blanks, at 4 cents per gross advance.....	\$320. 00
Item No. 2. Loss on pattern, 8,000 gross, at 10 cents per gross.....	800. 00
Item No. 3. Expense of changing and setting automatic machines.....	60. 00
Item No. 4. Expense of reselling (salesmen's commissions).....	112. 50
Item No. 5. Interest on manufacturing cost from date when ready for delivery until average date of sales, \$1,875 for 209 days, at 6 per cent	65. 31
Item No. 6. Overhead expense on reselling.....	50. 00
Total.....	1, 407. 81

6. Had the United States taken the buttons the contractor would have received 45 cents per gross, a total of \$2,250. The United States did not take the buttons and contractor sold the 5,000 gross for 45 cents per gross, receiving \$2,250.

7. Clearly the contractor is entitled to be reimbursed only for such expenses as were actually and necessarily incurred in selling the goods, due to the default of the Government in not accepting same.

8. The expenditures alleged to have been incurred under items 1, 2, 3, 5, and 6 are manifestly expenses in connection with the performance of the contract itself, and could not have arisen out of the failure of the Government to accept the goods.

9. Item 4, expense of reselling (salesmen's commissions), \$112.50, is an item of expense solely due to the Government not taking the buttons. The evidence is clear that the goods had to be sold to various customers and under the business practice the claimant paid a commission to salesmen for making such sales.

10. Section 1 of the act of March 2, 1919, provides that agreements found to exist under the provisions of said act shall be adjusted upon a fair and equitable basis.

DECISION.

1. An agreement, as prescribed by the act of March 2, 1919, was entered into on the 6th day of November, 1918, whereby the claimant became bound to manufacture and deliver and the Government to accept and pay for 5,000 gross water pearl buttons at 45 cents per gross. The claimant performed its contract in full. The Government defaulted and did not accept the goods; the claimant is, therefore, entitled to the difference between the contract price of 45 cents per gross and the fair value of the buttons at the time of sale, which fair value is the price realized less the actual cost of selling.

DISPOSITION.

1. This Board will make and transmit a statement of the nature, terms and conditions of the agreement and Certificate C to the Claims Board, Director of Purchase, for action in the manner provided in subdivision C, section 5, Supply Circular No. 17, Purchase, Storage and Traffic Division.

Col. Delafield and Mr. Averill concurring.

Case No. 1883.

In re CLAIM OF LOUIS BOSSERT & SONS (INC.).

1. **CANCELLATION OF CONTRACT—SUBSTANTIAL COMPLIANCE WITH TERMS OF CONTRACT.**—Where a contract provided for the cancellation by the Government of any part thereof at any time and for the payment to the contractor of the cost of materials on hand at the time of cancellation and where the Government's representatives after cancelling the contract procured a purchaser for such materials, there was a substantial compliance on the part of the Government with the cancellation clause of the contract. Claimant, having refused so to dispose of the materials, is not entitled to reimbursement for part of the materials still left on its hands.
2. **SAME—SUBSEQUENT NEGOTIATIONS.**—The claim that the obligation of the Government under the above circumstances was recognized or revived by representatives of the Government in the course of subsequent negotiations is without merit because the obligation was discharged when claimant refused to sell the materials and could not be revived by any action or promise of the Government's representatives.
3. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon a proxy-signed contract for boxes. Held, claimant is not entitled to relief.

Mr. Huidekoper writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Claims Board, Ordnance Department, on a claim originally filed with the New York District Claims Board for \$7,192.90 on an informally executed contract.

2. On February 20, 1918, the claimant, Louis Bossert & Sons (Inc.), Brooklyn, N. Y., entered into a written contract, War Ord. No. P3160-1089TW, for 334,000 packing boxes for 3-inch Stokes French mortar shells at 66 cents each. Deliveries were to be as follows:

During the month of	March	83,500
	April	83,500
	May	83,500
	June	83,500

Delivery to be made by truck to the plant of the Metropolitan Engineering Co., of Brooklyn, N. Y.

3. The contract contained a cancellation clause, in part as follows:

"ARTICLE IV. * * * It is therefore provided that at any time, and from time to time, during the currency of this contract, the Chief of Ordnance may notify the manufacturer that any part or parts of the articles or material herein contracted for then remaining to be delivered shall not be manufactured or delivered.

"In the event of the cancellation of this contract, as in this article provided, the United States will inspect the completed articles or material then on hand and such as may be completed within thirty (30) days after such notice, and will pay to the manufacturer the price herein fixed for the articles or material accepted by and delivered to the United States. The United States will also pay to the manufacturer the cost of the component materials and parts then on hand in an amount not exceeding the requirements for the completion of this contract, which shall be in accordance with the specifications referred to in Schedule 1 hereto attached, and also all costs theretofore expended and for which payment has not previously been made and all obligations incurred solely for the performance of this contract of which the manufacturer can not be otherwise relieved. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the manufacturer for work, labor, and service rendered under this contract."

4. On May 4, 1918, the contract was amended by reducing the quantity to be manufactured from 334,000 to 25,000. This action on the part of the Procurement Division was prompted by a report made by an inspection officer. In fairness to the claimant we wish to say that so far as we have been able to ascertain no good reason existed for this summary action on the part of Government officials. However, by the terms of the contract the Government could cancel it at any time and it was unnecessary to assign any reason therefor.

At the time claimant received notice of this reduction in the order it had on hand a quantity of material and supplies, including 750,000 feet of rope, box straps, cement-coated nails, etc., intended to be used in filling the order, but it had manufactured less than 3,000 boxes on May 4, 1918. This delay was due to the fact that the Metropolitan Engineering Co. was unable to accept deliveries in the quantities provided in the contract.

On May 15, 1918, claimant was notified by letter from Capt. W. S. Goodwillie, Packing Container Section, Procurement Division, Ordnance Department, that the canceled portion of its contract had been given to the Dunning-Varney Corporation. Paragraph 2 of that letter is as follows:

"In conversation over the telephone this morning with the Dunning-Varney Corporation they mentioned that you did not care to sell the supply of iron and rope that you had on hand to these people, and it is the opinion of the Packing Container Section that it would be a good idea to dispose of the hardware to save yourselves further loss."

At the hearing claimant admitted that it could have disposed of all of the material it had on hand to the Dunning-Varney Corporation and that it would have sustained no loss by reason of the reduction of the order to 25,000, but that its reasons for not doing so were, first, claimant hoped that the cancelled portion of the order would be reinstated; second, claimant did not want its competitor to get the material.

5. For several months after receiving the amendment of May 4 claimant refused to accept the same, although it did stop production when 25,000 boxes had been manufactured. Finally, on August 10, 1918, the Procurement Division, Ordnance Department, wrote claimant that it would be given an order for 20,000 packing boxes for detonating fuzes at \$1.80 each. The fourth paragraph of this letter was as follows:

"4. In consideration of this contract, it is understood that you are to furnish the Government with a release on the cancellation of contract for 334,000 3" Stokes boxes under contract P3160-1089TW, providing the Government arranges for the disposal of the hardware and rope purchased by you to be used for the above-mentioned 3" Stokes boxes."

The formal contract for these boxes was dated August 17, 1918, and contained no mention of the controversy relative to the cancellation of the larger part of the order for 334,000 boxes.

6. Claimant used or disposed of all of the rope, a part of the iron strapping, and some of the other material on hand before the armistice, but never at any time requested the Ordnance Department to take the balance of the material off its hands or otherwise assist it to dispose of the same.

7. The items of the claim as originally filed were as follows:

Full description of material.	Quantity.	Unit.	Net unit cost, inc. frt.	Amount.
1. Box straps (at this plant).....	66,500	Sets.....	\$0.54	\$3,491.25
2. Express chgs. & cart. on 75 M sets.....				238.96
3. Screws or picture hooks.....	3,944	Gro.....	.25	986.00
4. Cartage.....				10.00
5. Staples at this plant.....	150	Lbs.....	.1445	21.68
6. 8d. cement-coated nails (at this plant).....	370	Kegs.....	3.7956	1,404.37
7. Overhead.....				1,039.74

However, at the hearing it developed that the 66,500 sets of box straps ordered by claimant from the Acme Steel Goods Co., and delivered, had been fully paid for by either Dunning-Varney Corporation or the Ordnance Department, so that this item of the claim is eliminated. The item for screw or picture hooks has also been reduced from \$986 to \$210. The item for cement-coated nails, \$1,404.37,

has also been eliminated, so that the claim as it now stands is as follows:

Express charges on box straps.....	\$238. 96
Screw hooks at our plant.....	210. 00
Special cartage.....	10. 00
Staples	21. 68
Overhead to May 4, 1919.....	1, 039. 74
Storage to date.....	72. 00
	<hr/>
	1, 592. 38

The principal item of the claim, \$1,039.74, is the overhead or carrying charges on the 66,500 sets of box straps, 3,944 gross of screw hooks, 150 pounds of staples, and 370 kegs of nails, and is figured on the basis of 16.9 per cent of the cost thereof, viz, \$6,172.26. The carrying charges on the box straps alone, which claimant never had to pay for, amounts to \$630.41.

DECISION.

1. According to the terms of the contract the Chief of Ordnance could at any time cancel any part of the contract. The greater part of the contract in question was cancelled, but the claimant insisted that such could not be lawfully done and refused to acquiesce in the cancellation. According to the terms of the contract when it was cancelled in part on May 4, 1918, the claimant was entitled to be paid the cost of the materials then on hand. The Ordnance Department tendered its services to claimant to assist it in disposing of this material and claimant admits that it could have disposed of the same without having sustained any loss whatever if it had been willing to sell to its competitor. The Board feels that this action on the part of the claimant was arbitrary and unreasonable. It was the duty of the claimant to dispose of this material to the best advantage possible in order to make its loss as small as possible. The Board is of the opinion that if claimant had pursued the course suggested by the representatives of the Government claimant would have sustained no loss. The action of the Ordnance officers in securing for claimant a purchaser for all of the material claimant had on hand was a substantial compliance with that provision of the contract which required the Government to pay the cost of the materials on hand at the time of the cancellation of the greater part of the contract.

2. The letter of August 10, 1918, advising claimant that it would be given another contract, viz, the order for 20,000 packing boxes for detonating fuzes, at \$1.80 each, and stating that in consideration thereof claimant was to release the Government on the cancellation of the greater part of the order for 334,000 packing boxes for

3-inch Stokes mortar shells on condition that the Government should arrange for the disposal of the materials to be used in the order for boxes for 3-inch Stokes mortar shells, attempts to create an obligation on the part of the Government to save claimant harmless against any loss sustained by reason of the cancellation of May 4 when such obligation on the part of the Government no longer existed. It also attempts to make the release to the Government a part of the consideration for an order for 20,000 packing boxes for detonating fuzes, whereas the consideration supporting that order is the purchase price stipulated, namely, \$1.80 per box. The obligation of the Government to reimburse claimant because of the cancellation of May 4 having been discharged when claimant refused to dispose of the material when it had an opportunity to do so at no loss to itself, this obligation could not be revived by any action or promise of representatives of the Government.

3. For the reasons above stated the Board is of the opinion that the claimant is not entitled to any reimbursement on any of the items involved in this claim. The relief sought is therefore denied.

Col. Delafield and Maj. Taylor concurring.

Case No. 1491.

In re CLAIM OF PHILIP CAREY CO.

1. **CANCELLATION OF CONTRACT—JURISDICTION.**—When a contract has been canceled for an entire failure of performance on the part of the contractor, the Secretary of War has no jurisdiction to make a settlement thereunder.
2. **SAME—ACT OF MARCH 2, 1919.**—Under such circumstances there can be no recovery under the act of March 2, 1919, because it does not appear that claimant's agreement "has been performed in whole or in part."
3. **NO LOSS SHOWN.**—Claimant is not entitled to relief for the further reason that after the cancellation it used the materials which are the subject of this claim in its commercial trade and fails to show any loss.
4. **CLAIM AND DECISION.**—Claim under the act of March 2, 1919, based upon an informally executed contract for wall board. Held, claimant is not entitled to relief.

Mr. Bryant writing the opinion of the Board.

FINDINGS OF FACT.

The Board finds the following to be the facts:

1. This is an appeal from a decision of the Board of Contract Review, Construction Division of the Army, on a claim for \$7,183.34, on an informally executed contract.

2. In September, 1918, the claimant was advised by R. S. Teele, purchasing agent for the Government, that the Government would need 5,000,000 square feet of wall board and that the claimant would receive an order for a substantial portion of this amount. On October 24, 25, and 26, 1918, the claimant purchased a large amount of chipboard in anticipation, as it claimed, of the receipt of an order.

3. Under date of November 2, 1918, the claimant was given an order, No. 101 Fort Benjamin Harrison, for 1,200,000 square feet United States Government specification wall board, signed by Brig. Gen. R. C. Marshall, Jr., Chief of the Construction Division.

4. The claimant started to manufacture the wall board and on November 8, 1918, had completed one carload. This was inspected by Government inspectors and rejected as not coming up to Government specifications.

5. On November 11, 1918, the following telegram was sent to the claimant:

"Cancel orders * * * and one naught one Fort Benjamin Harrison twelve hundred thousand square feet. This action taken because of your inability to manufacture Government specification wall board as reported by Inspection Department.

"MARSHALL—PROCUREMENT—TEELE."

The claimant did nothing further on this order.

6. After the armistice the claimant went out into the commercial market, obtained orders, and used the chipboard which it claims to have allocated to the Government order in the performance of its commercial contracts.

7. Mr. R. B. Crabbs, vice president and treasurer of the claimant company, who testified at the hearing, made no claim, upon being interrogated on that point, that the claimant suffered a loss on its private contracts in which it used the chipboard in question.

8. On February 28, 1919, the claimant had exhausted its stock of chipboard and went into the market to purchase further stock. At that time the price of chipboard had fallen.

9. The present claim is for the difference in price paid for the chipboard which the claimant alleges was allocated to order No. 101 and the price which it had to pay for an equivalent amount of chipboard on February 28, 1919.

DECISION.

1. There appear to be several reasons, any one of which is sufficient to preclude the granting of relief to the claimant.

2. In the first place, its order was cancelled by the Government for failure of the contractor to live up to its contract. If this cancellation was justified, no further rights against the Government exist upon the contract. If the cancellation was unjustified, the Government has breached its contract and the Secretary of War has no power to make settlement thereunder. In the latter contingency the claimant's right should be enforced by suit against the Government.

3. As the only thing the claimant did between the date of the order and the armistice was to manufacture a certain amount of wall board which did not come up to Government specifications, it does not appear that the claimant's agreement "has been performed in whole or in part * * * prior to November 12, 1918," within the meaning of section 1 of the act of March 2, 1919.

4. In the third place, the chipboard in question was used by the claimant in its private business, and it does not sufficiently appear that any loss was suffered by the claimant in connection therewith.

DISPOSITION.

Final order will issue denying relief to the claimant.
Col. Delafield and Mr. Barnes concurring.

Case No. 180.

In re CLAIM OF STANLEY INSULATING CO.

1. **CLAIM AND DECISION.**—This claim was originally presented under General Order 103 as based upon a duly executed contract and was allowed by this Board on that basis. At the request of the Director of Purchase the matter has been reconsidered and relief granted under the act of March 2, 1919, as under an informally executed contract. On the merits, the former decision is affirmed, including the amount to be paid claimant.

Mr. Hamilton writing the opinion of the Board.

1. This claim has already been decided upon the merits (I these Decisions, 322) as resulting from a suspension of the performance of a contract entered into and executed in a manner prescribed by law (Revised Statutes, sec. 3744, Compiled Statutes, sec. 6895; Compiled Statutes, sec. 6853, 6853-b) by the claimant and the depot quartermaster, Chicago, Ill., on January 3, 1918.

2. It is now asserted by the Director of Purchase that this claim should have been held to have arisen out of the suspension of performance of an agreement *not executed in the manner prescribed by law* and the adjustment, if any, should be authorized under the provisions of the act of March 2, 1919 (40 Stat. 1272).

DECISION.

1. It is the opinion of this Board that the original decision issued on July 31, 1919, was correct in all respects and as to the merits of the claim that decision is hereby confirmed.

2. The Board is also of the opinion that the case might have been regarded as growing out of an agreement not executed in the manner prescribed by law. In order to facilitate the conduct of its business by the Office of the Director of Purchase, a supplemental finding is now made.

3. Shortly after January 3, 1918, a contract was verbally entered into with the claimant by the Government, acting through Lieut. Eugene C. Ecker, retired, wherein the claimant agreed to conduct experiments under his direction and that of the Bureau of Standards, Department of Commerce, looking to the perfection of an all-steel 5-gallon *ferrostat* food container similar to that described in order No. 5736 issued to the claimant by the depot quartermaster, Chicago, Ill., on January 3, 1918, and upon its perfection, to manufacture and

deliver to the Government 20 such containers. The Government agreed to pay to the claimant the cost of such experiments and of the manufacture of the containers and also a profit of 10 per cent on such costs.

3. In the performance of this agreement the claimant expended \$11,511.30, which sum, together with \$1,151.13 profit, should be paid to the claimant by the Government.

4. It is hereby directed that a statutory award issue nunc pro tunc, granting relief to the claimant in accordance with this decision.

DISPOSITION.

1. This Board will make a statutory award and cause the same to be executed on behalf of the United States nunc pro tunc, as of July 31, 1919, and by the claimant, which will be transmitted to the appropriate finance officer for appropriate action.

Col. Delafield and Mr. Hendon concurring.

Case No. 1827.

In re **CLAIM OF THE DRYING SYSTEMS (INC.).**

- 1. PLANT AND EQUIPMENT—"SPECIALLY PROVIDED"—SUPPLY CIRCULAR 111.**—Where a manufacturer had a plant which it had used in the performance of a Government contract for the production of dehydrated potatoes, and thereafter, in anticipation of further contracts, made alterations in its plant prior to the time it entered into the contract, under which damages are claimed, the expense of said alterations can not be said to come within the provisions of Supply Circular 111 so as to entitle claimant to an adjustment under the act of March 2, 1919, as facilities specially provided for the performance of the contract.
- 2. CLAIM AND DECISION.**—Claim under the act of March 2, 1919, for expense of altering manufacturing plant. Held, relief may be given for the unabsorbed amortization.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF CLAIM.

This is an appeal from a decision of the Claims Board, Office of the Director of Purchase, on claim for compensation arising under a duly executed contract between the United States and the claimant, performance of which was suspended, when partly performed, on request of the United States.

Settlement proceedings pursuant to Supply Circular 111 had been entered into prior to the said decision, and a settlement contract agreed to between the Zone Board of Review at Chicago and the claimant.

The Claims Board, Office of the Director of Purchase, is disposed to approve the settlement agreement, with exception of the item amounting to \$33,605.63 representing such recoupment of facilities as would have been accomplished had the contract been fully performed. Refusal to approve this item was for the reason that it appeared that a part of the said facilities were not specially provided for the performance of this contract.

FINDINGS OF FACT.

A hearing on this claim was had January 20, 1920, at which the following appeared:

The Drying Systems (Inc.), prior to April 6, 1917, was engaged in business as designers and manufacturers of drying equipment. In

April or May, 1917, a representative of the claimant, at the invitation of the Acting Quartermaster General, submitted samples of dehydrated potatoes, with a view to supplying them to the Army overseas. At that time the claimant had no plant in operation, but in January, 1918, leased a plant from the Webster Products Co., of Webster, N. Y., and entered into a contract with the United States, No. 6-517, under which the claimant was bound to deliver 200,000 pounds of such potatoes, subsequently reduced to 75,000 pounds by reason of the inability of the claimant to produce the larger amount in due season. Some 55,000 pounds of the product was produced at the Webster, N. Y., plant, which, however, was found to be inefficient. The claimant accordingly acquired and equipped a plant at Michigan City, Ind. (Record, p. 14.) Some 20,000 pounds of the quantity delivered under contract No. 6-517 was produced at the Michigan City plant.

During the spring and summer of 1918 claimant company was in negotiation with the Subsistence Division, Quartermaster Corps, with a view to obtaining a larger contract for the delivery of dehydrated potatoes. At that time the ocean tonnage situation was such as to require utilization of every means available to reduce the bulk of articles to be shipped abroad for use of the Army. A certain quantity of potatoes per soldier was practically necessary and the European supply uncertain. This information was communicated to the claimant by officers of the Subsistence Division, Quartermaster General's Office, and was acquired also from newspapers, trade journals, and otherwise. Estimating the probabilities of receiving a contract for a large quantity of dehydrated potatoes, claimant proceeded to alter its plant at Michigan City, Ind., which had been designed up to that time for the dehydration of all dehydratable vegetables, to a plant specially designed for the dehydration of potatoes only. It expended in such alteration a considerable amount between the completion of the first-named contract and September 21, 1918, at which time it received notice by telegram that a contract for 1,000,000 pounds of dehydrated potatoes would be awarded. It does not maintain that positive assurances were given it prior to September 21, 1918, that it would receive an additional contract for its product from the United States. If, however, it was to be in a position to produce dehydrated potatoes on a substantial scale, and with speed, the redesigning and further equipping of its plant must necessarily have proceeded in advance of the awarding of the contract. If it had not equipped itself for performance prior to September 21, 1918, it would not have been qualified to perform the contract, and probably would not have had the opportunity to make it. It was not induced to the expense by

representations of Government officers that the need of the United States for dehydrated potatoes was such as to absorb all possible product that might be produced. Claimant was only one of a number of producers and was by no means the largest.

DECISION.

The cost of the facilities provided prior to September 21, 1918, not having been incurred by the claimant upon the faith of any assurances or representations made by officers of the United States, but upon its own estimate of the situation, such cost can not be said to have been "specially provided and paid for by the contractor for the performance of the contract," as provided in Supply Circular 111.

DISPOSITION.

This case will be transmitted to the Claims Board, Office of the Director of Purchase, for further proceeding pursuant to the decision herein.

Col. Delafield and Mr. Bryant concurring.

Case No. 2376.

In re **CLAIM OF ENGLISH & MERSICK CO.**

1. **QUANTUM VALEBAT.**—Where after settlement of a Suspended formal contract claimant discovers materials which were through its own mistake omitted from the settlement, and the Government thereafter orders and accepts delivery of such materials, claimant is entitled to be paid the reasonable value of said materials, and a certificate of fair value should be issued to facilitate payment by the Treasury Department.
2. **CLAIM AND DECISION.**—Claim filed under the act of March 2, 1919, for the value of waterproof paper and box strapping discovered after claimant had settled its formal contract for airplane radiators. Held, claimant is not entitled to relief under the act of March 2, 1919, nor to re-formation of the settlement agreement on the ground of mistake, but is entitled to recover on the basis of quantum valebat.

Mr. Howe, writing the opinion of the Board.

This claim arises under the act of March 2, 1919. Statement of claim, Form A, has been filed and the claim comes to this Board on appeal from a decision of the Claims Board, Air Service.

The claim is for \$275.04, alleged to be the value of certain material consisting of 39 rolls of Kraft waterproof paper and 12,000 feet of japanned box strapping, originally purchased by claimant for the purpose of performing a contract with the Bureau of Aircraft Production and not included in a settlement reached after the suspension of this contract.

The claim was set for a hearing because it appeared from the record before the Board that perhaps claimant might wish to supplement the record by oral testimony as to certain matters of fact. Claimant, however, has declined to attend a hearing, so it becomes necessary to dispose of the case on the record as it stands.

STATEMENT OF FACTS.

1. The claimant is a manufacturer of hardware in New Haven, Conn.

2. On September 16, 1918, claimant received a formal contract, No. 4673, from the Bureau of Aircraft Production of the United States Army for the manufacture of 725 radiators and attachments for DH-4 aeroplanes. This contract was suspended November 30, 1918.

3. March 24, 1919, claimant entered into a supplemental contract with the Bureau of Aircraft Production in settlement of the above contract No. 4673. This settlement contract provided for the payment to contractor of \$570 as full compensation for articles, work, and services delivered and rendered, and expenditures incurred by the contractor under the original contract, including a general release

from the contractor to the Government of all claims arising out of the original contract No. 4673.

4. It appears that after making this settlement claimant discovered that it had on hand in its warehouse the 39 rolls of waterproof paper and 12,000 feet of strapping which is the basis of this claim and which had been omitted from consideration at the time of the settlement agreement because its existence had not been reported to claimant's accounting department by claimant's storekeeper and therefore was unknown to both claimant and the Government at the time of the settlement.

5. The record indicates that between March 24 and July 15, 1919, the question of payment for this material was brought to the attention of the Material Disposal Section of the Air Service at Boston, Mass., and to the Office of the Director of Air Service in Washington, but the evidence in regard to this is not sufficient to establish any assumption of responsibility by the Government for the materials up to that time.

6. On July 15, 1919, claimant received from the district property officer, Material Disposal Section, a letter referring to a conversation with the writer which is not in the evidence, and requesting the claimant to ship to the warehouse of the district property officer at Brighton, Mass., 9,000 feet of strapping and 44 rolls of paper, and inclosing a Government bill of lading to cover the movement.

7. This letter was answered on July 18, 1919, by the claimant who appeared to be unwilling to make the shipment until paid for the material.

8. This letter was followed by some interdepartmental correspondence indicating that the Material Disposal Division was endeavoring to have payment for the materials made and embodying a statement from the Chief of the Material Disposal Section that the Contract Section had amended the original purchase order covering the material so as to provide for payment for the materials in question and requesting the district property officer at Boston to authorize the Material Disposal Division to take title to the property so that the claimant could be paid.

9. As a result of this it appears that the Finance Division of the Disbursement Section advised the district property officer that no steps to make payment could be taken until claimant shipped the property. Whereupon, on August 18, 1919, the district property officer notified the claimant that the Finance Section was amending the original purchase order so as to cover the 39 rolls of paper and the 12,000 feet of strapping, and "from the above facts it would appear that by shipping these materials this office will then be in a position to so advise Washington, and payment that you mention in

your letter of July 18, which has not been received, will be very much hastened."

10. Whereupon, on August 26, claimant shipped the materials to the district property officer at Boston, Mass., where the property still remains.

11. Thereafter, some effort seems to have been made by the district property officer so to complete the record as to show acceptance of this property by the Government and enable payment to be made for it. As far as it appears from the record, before this could be carried out, claimant filed a claim for the value of the property, whereupon the situation was treated from the standpoint of a filed claim.

12. Nevertheless, on November 21, 1919, the Material Disposal Division at Boston requested from the Director of Air Service in Washington a bill of lading to cover the shipment on the theory that the material had become Government property, and this bill of lading seems to have been forwarded as requested.

13. Although, as the district property officer remarks in one of the letters in the record, "the situation is a trifle complicated," it appears sufficiently from the record that in spite of the execution of the settlement agreement, claimant was requested by the Material Disposal and Salvage Division to send the property to the Boston warehouse, where the Government accepted and assumed title and responsibility on its arrival.

14. The claim is brought on the theory:

(1) That the settlement agreement should be set aside for a mistake and the value of these materials included in a reformed settlement agreement; or

(2) That the claimant should be reimbursed under the act of March 2, 1919, as upon an agreement based on the correspondence above set forth; or

(3) That he should be paid the reasonable value of these materials in view of their final acceptance by the Government.

15. The district manager of the Liquidation Division of the Air Service seems to have investigated the question of what these materials are reasonably worth, and it appears from the report submitted to him by his investigator that if the reasonable value is to be allowed it should be computed on the following basis:

	Claimed.	Disallowed.	Allowed.
39 rolls Kraft waterproof paper, at \$5 per roll.....	\$195.00	\$3.90	\$191.10
12,000 feet jappanned box strapping, at \$6.67 per M feet.....	80.04	1.60	78.44
Total.....	275.04	5.50	269.54

The total disallowance of \$5.50 is made because there was a 2 per cent cash discount on both invoices which the claimant has taken advantage of.

DECISION.

1. On the evidence before this Board there seems to be no basis for compensating the contractor within the terms of the original contract. This contract has been settled by an agreement entered into by contractor, and there is no evidence before the Board of mistake such as to be reason for regarding this settlement as not binding on the claimant.

2. Nor does it seem possible to give any relief under the act of March 2, 1919. Claimant states positively that the first presentation of any claim by it was made on August 7, 1919, and there is not sufficient evidence in the record of any fact that could be construed as a presentation before June 30, 1919.

3. It does, however, sufficiently appear that the materials were delivered to the Government at the Government's request, and have been accepted, and that claimant should be paid therefor the reasonable value of said materials.

4. Said reasonable value this Board finds to be the sum of \$269.54.

DISPOSITION.

The claim is referred back to the Claims Board, Director of Air Service, with the recommendation that a certificate of fair value in the above amount be issued and transmitted to the Treasury Department for appropriate action in accordance with this opinion.

Col. Delafield and Maj. Hope concurring.

Case No. 2467.

In re **CLAIM OF CHARLESTON CONSOLIDATED RAILWAY & LIGHTING CO.**

1. **INTEREST, CONSTRUCTION OF CONTRACT.**—Where a construction contract provides that the contractor shall pay to the Government interest on the total net sum provided by the Government toward the construction of a power plant and transmission line, from the time of completion and when the monthly bills for electricity used by the Government equals, or exceeds, a certain sum, it was not the intention of the parties that interest should be paid until the Government was in a position to consume and to continue to consume for a substantial period the amount stipulated, and the use of electricity by intentional waste for the purpose of fixing the time when interest should begin to run is not authorized by the contract.
2. **CLAIM AND DECISION.**—Question submitted by the Director of Purchase, Storage, and Traffic under General Order 103, as to when a contractor should begin to pay interest under the terms of a construction contract. Held, that no action should be taken to increase artificially the consumption of electrical energy by the Government.

Mr. Hunt writing the opinion of the Board.

ORIGIN AND NATURE OF THE CONTROVERSY.

This is a controversy arising out of a contract and is submitted to this Board for determination by order of the Director of Purchase, Storage and Traffic under General Order 103.

FINDING OF FACTS.

On September 1, 1918, the facilities at Charleston, S. C., for the production and transmission of electrical energy to supply the necessities of the United States were inadequate. A contract was accordingly duly executed on that date between the United States and the Charleston Consolidated Railway & Lighting Co. to provide for the increase of these facilities. The preamble of this contract, among other things, recites:

“Whereas the Charleston Consolidated Railway & Lighting Company has been influenced to enter into this contract on the expectation and upon the representation that the consumption of electrical energy by the War Department will amount to approximately \$60,000 a year during the period of the war and to a substantial amount thereafter for several years, and based upon such estimate the said company not only entered into this contract, but has borrowed from the War Finance Corporation the sum of \$350,000.00 at 7% interest to provide for 60% of the proposed enlargement of its power plant.”

By the binding clauses of the contract the company agreed to prepare necessary plans and specifications for the construction of the addition to its power plant and transmission line to the Government enterprise, substantially in accordance with the preliminary plans and estimates submitted to the contracting officer, total not to exceed \$350,000 in amount. The company was to provide the necessary land and all miscellaneous material and labor necessary to complete the addition to, and extension of, the power plant and existing transmission line from the nearest point to the Government substation at North Charleston, and the addition of a duplicate circuit from the power plant to the Government substation.

When the work above described was completed, the cost thereof was to be apportioned as follows:

The United States was to bear the entire cost of the transmission line extensions and additions and necessary switching equipment therefor, except repairs or replacements to the line which might be deemed advisable. The remainder of the total cost was to be borne in the ratio of 60 per cent by the company and 40 per cent by the United States.

On completion of the work and after an apportionment of the cost thereof the United States was to retain title to such items of equipment, machinery, and apparatus as it might select, as the cost thereof should total its share of the entire cost of the work. The company agreed to purchase from the United States all the machinery, equipment, and apparatus owned by it in connection with the power plant and transmission line at an appraised value.

Paragraph 19 of the contract provides:

"The company shall pay to the contracting officer, for the use of the United States, interest quarterly at the rate of 4½% per annum upon one-half of the total net sum provided by the United States towards the construction of said power plant and transmission line. Such payment shall begin upon the completion of the plant extension and when the monthly bills for electrical energy used by the contracting officer first equal or exceed two thousand dollars (\$2,000) and shall continue down to the time of the final fixing of the principal amount to be paid by the company to the United States for the repurchase of its interest in the said power plant and transmission line."

It appears from paragraph 6 of the letter of the Chief of the Construction Division, dated February 6th, that—

"Due to the curtailment of activities, the monthly consumption of electrical energy (paid for on the basis of separate contract for electric services) does not exceed \$700 per month and there is no prospect under ordinary circumstances that the amount will be appreciably increased."

The letter of the Chief of the Construction Division inquires whether it would be proper, in order to take such action as would

require the payment of interest under clause 19 of the contract by the contractor, to increase artificially the consumption of electrical energy by burning all the warehouse lights in the Government warehouse during one month, or, if the course stated is not proper, what course should be adopted.

DECISION.

From a consideration of the terms of the contract, the intention of the parties appears to have been that the payment of interest by the company under clause 19 should not begin until the United States should consume at least \$2,000 worth of electrical energy per month. It appears from the letter of the Chief of the Construction Division that the United States is not now, and there is no prospect that it will be within a reasonable time, in a position to require \$2,000 worth of such electrical energy. It follows that interest under clause 19 is not yet due to the United States. The period at which the payment of interest shall begin was agreed upon by the parties, as expressed in clause 19. It is obvious that the intention was that payment of interest should not begin until the United States was in a position to consume, and to continue to consume for a substantial period, the said amount of electrical energy per month.

The recital quoted above, that the United States had represented that the consumption of electrical energy consumed by the War Department would amount to approximately \$60,000 per year during the period of the war and a substantial amount thereafter for several years, tends strongly to show that it was not the intention of the parties that interest should be paid by the contractor until payment for a substantial amount of electrical energy consumed should be due the contractor. The period of consumption of such amount must be presumed to be such period as would, together with other considerations to the contractor, reasonably compensate it for the installation of its share of the facilities.

DISPOSITION.

The Chief of the Construction Division will be advised that no action should be taken to increase artificially the consumption of electrical energy.

Col. Delafield and Mr. Baggarly concurring.

TOPICAL INDEX.*

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A.

ACCEPTANCE.

ACCEPTANCE.

Where purchase orders required delivery f. o. b. at a certain point, the Government is not obligated to accept at such point in order to make immediate payment therefor, where chemical tests by analyses are necessary, and though shipped from the delivery point on Government bill of lading, such shipment does not constitute an unqualified acceptance by the Government, as such title only passes to it as was subject to rejection, if when inspected the goods did not comply with the specifications. (E. C. Gatlin Importing Co., Case No. 661, III these Dec., 757.)

See also CONTRACTS, CANCELLATION; INTEREST, INTEREST ON CLAIMS AGAINST THE GOVERNMENT.

ACCEPTANCE, AGREEMENT IMPLIED FROM.

See CONTRACTS, IMPLIED.

ACT OF MARCH 2, 1919.

ACT OF MARCH 2, 1919, CONSTRUCTION.

The act of March 2, 1919, is remedial in its nature, and the purpose of the Secretary of War in its administration is to do substantial justice. (Ford Motor Co. and Taft-Pierce Manufacturing Co., Case No. 2300, III these Dec., 542.)

The act of March 2, 1919, being remedial, should be liberally construed. (H. N. White Co., Case No. 2164, III these Dec., 88.)

See also CLAIMS, FILING.

ACT OF MARCH 2, 1919, WHAT IS NOT AGREEMENT WITHIN MEANING.

See CONTRACTS, WHAT CONSTITUTES.

ADDITIONAL COMPENSATION.

See COMPENSATION.

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See EXPENSES, EXTRA.

ADDITIONAL WORK.

See COMPENSATION.

ADOPTION OF FOOD ADMINISTRATION BULLETIN BY WAR DEPARTMENT.

See INTEREST, ON CLAIMS AGAINST GOVERNMENT.

ADJUSTMENT OF CLAIM.

See CONTRACTS, ADJUSTMENT.

ADVERTISING.

See CONTRACTS, UNLAWFUL.

* The topical index of this volume was prepared under the direction of First Lieut. R. T. Walter Duke, Infantry, and Myrtle Judson Duke.

AFFIDAVITS.

See EVIDENCE.

AGENTS.**AGENTS.**

The War Service Committee on Furniture and Fixtures and Allied Wood Industries was a voluntary trade organization and not an agent of the Government. (Economy Drawing Table Co., Case No. 1585, III, these Dec., 56.)

Where the chairman of said organization recommended that an order for 200,000 pick mattock handles issue to claimant, and the chairman notified the claimant that he has so recommended, and claimant incurs expense on the strength of said notice, and the order is never issued by the Government, there is no agreement, express or implied, on the part of the Government to reimburse claimant for expenses so incurred. (Economy Drawing Table Co., Case No. 1585, III these Dec., 56.)

AGENTS, AUTHORITY TO BIND GOVERNMENT.

Where a construction manager for the erection of a plant is appointed under a formally executed contract, which provides that the construction manager may enter into contracts for the necessary labor and services, with the approval of the special director, who is appointed by the Secretary of War in writing, such construction manager, with the approval of an assistant director appointed in writing by the special director, is duly authorized to amend a formal contract, in the interest of the Government. (A. B. See Electric Elevator Co., Case No. 2406, III these Dec., 683.)

Where a claimant seeks to recover upon an informal War Department contract which is alleged to have been made on behalf of the Government by an inspection officer of the Navy Department, and claimant well knew such officer did not have authority to contract, no contract was made within the act of March 2, 1919. (American Can Co., Case No. 2616, III these Dec., 351.)

The agreement to pay moving expenses from Building "F" to Building "A" does not, by implication, include the expenses of moving back from Building "A" to Building "F" after the period of the emergency, especially when the Government's agent told claimant that he had no authority to commit the Government to such expenses. (Bijur Motor Appliance Co., Cases Nos. 1215, 1622, 1623, and 1624 combined under No. 1215, III these Dec., 850.)

Where claimant was instructed over the telephone to proceed without waiting for a procurement order, to manufacture 1342 recoil mechanisms for tractor guns of the same kind and at the same price as those manufactured for the Government under a previous written contract, and the claimant proceeds to fill the order, which was later countermanded, the United States is obligated, under the act of March 2, 1919, to reimburse the claimant its loss sustained in expenses made preparatory to filling the order, before same was countermanded. (C. H. Cowdrey Machine Works, Case No. 1674, III these Dec., 135.)

Where claimant seeks payment for expenditures made in purchasing materials to perform an alleged informal contract and to establish the contract, relies upon statements made by officers and civilian agents of the Government to the effect that claimant had received or would receive an order for artillery wheels, and the claimant well

AGENTS—Continued.

knew that such persons had no authority to contract and that their statements were merely expressions of opinion, there was no contract made within the provisions of the act of March 2, 1919, to reimburse claimant for said expenditures. (Crane & MacMahon (Inc.), Case No. 480, III these Dec., 160.)

Where an authorized agent of the Government ordered a contractor to make an extra set of tools and store outside of its plant, so that if its plant was destroyed by fire the manufacture of the ignition apparatus would not be interrupted, and the contractor complied therewith, there is an agreement on the part of the Government to pay therefor. (Dayton Engineering Laboratories Co., Case No. 559, III these Dec., 78.)

Where a duly authorized agent of the Government agrees that the Government will purchase all the materials the manufacturer is able to produce for an indefinite period during the war, and a quantity of material manufactured is delivered, and a quantity which has been manufactured is not delivered, on account of the armistice, there is an agreement within the meaning of the act of March 2, 1919. (The Detroit Chemical Works, Case No. 1643, III these Dec., 874.)

Where claimant was instructed by an authorized agent of the Government to proceed at once to acquire the necessary facilities for performing a Government contract and was told that he would be recommended for a contract, and claimant, pursuant to said instructions, did make preparations, there is an implied agreement on the part of the Government to reimburse claimant for the amount so expended. (Enterprise Stamping Co., Case No. 165, III these Dec., 91.)

Claim for \$51,633.10 under the act of March 2, 1919, for reimbursement for increased plant equipment on representation of Government agent that same would be compensated for by the Government. Held, claimant is entitled to relief. (Farrell Cheek Steel Foundry Co., Case No. 1488, III these Dec., 825.)

Where an officer of the Government orally orders the installation of a chlorine plant on the understanding that materials are to be furnished and that the work is to be done at cost plus a percentage, there is an agreement such as will obligate the Government to pay a reasonable price, which in this case is found to be a reasonable price for the materials and the cost of labor, plus a profit of 10 per cent on such cost of labor. (Frick Co., Case No. 1708, III these Dec., 627.)

Where a contract contains a termination clause according to the form prescribed by Supply Circular 88, providing that materials in process at termination shall be paid for by the United States, and on being so paid for, shall become the property of the United States, a contractor may, nevertheless, enter into a supplemental agreement by which the contractor is permitted to retain materials not wanted by the Government at an agreed salvage value. Supply Circular 111, in directing termination in accordance with termination clause where there is one, authorizes such a provision in the settlement contract. (B. F. Goodrich Rubber Co., Case No. 2444, III these Dec., 474.)

Where after formal orders for articles at fixed prices, not deemed sufficient by the contractor, are issued, but not accepted and there-

AGENTS—Continued.

after the contractor and a duly authorized representative of the Government agree that the prices fixed in the orders will be increased 10 per cent and the contractor is instructed to proceed, without waiting for formal contracts or amended written orders, and does so, and has partially completed the contracts, when further production is ordered stopped by the Government, there is an agreement within the meaning of the act of March 2, 1919, which the Secretary of War is authorized to adjust. (The Kahler Co., Cases Nos. 2329, 2330, 486, and 487, III these Dec., 884.)

Where a contractor is advised that a contract will be given it and immediately begins work at the request of the Government and takes out public liability insurance, with the approval and under the direction of the constructing quartermaster at the camp where the buildings are to be constructed upon the understanding that he is to be reimbursed therefor, there is an agreement to reimburse the contractor for the expense thereof, within the meaning of the act of March 2, 1919. (Fred T. Ley & Co. (Inc.), Case No. 741, III these Dec., 880.)

Claim is filed under the act of March 2, 1919, for service of auditing, at the express request of an authorized Government agent. Held, that claimant is entitled to recover. (Lybrand Ross Bros. & Montgomery, Case No. 1722, III these Dec., 37.)

Where it is established that there was an understanding between the Procurement Division and the Production Division of the Ordnance Department that the latter should act as the representative of the former in a program for increased facilities for the manufacture of pistols, urgently required, the action of the Production Division will be deemed to be the action of the Procurement Division as well. (Manning, Maxwell & Moore (Inc.), Case No. 1522, III these Dec., 343.)

Where claimant constructed an electric power line at the urgent request of a member of the War Industries Board, who promised claimant to do all he could to help claimant out on the cost thereof if a bill then before Congress enabling it so to do should pass, there is no agreement, express or implied, whereby the Government is obligated to pay any of the expenses thereof. (The Massillon Electric & Gas Co., Case No. 374, III these Dec., 254.)

Claim is filed under the act of March 2, 1919, for \$12,499.50, expenses incurred preparing to make hard-bread cans at the special request of an authorized agent of the Government. Held, claimant is entitled to recover. (National Can Co., Case No. 280, III these Dec., 65.)

Where a local fuel administrator, who had authority to divert a consignment of coal, exceeded his authority by collecting therefor and converting the proceeds thereof to his own use, such conversion entails no obligation on the part of the Government to reimburse the shipper for the coal under the act of March 2, 1919. (North Jellico Coal Co., Case No. 666, III these Dec., 720.)

Where a claimant was instructed by officers of the Construction Division of the Army to cease selling one of its products to private customers because this was urgently needed for Government purposes and was assured by them that it would be paid actual cost plus a reasonable profit on the amount delivered on their orders, there was an agreement within the terms of the act of March 2, 1919,

AGENTS—Continued.

such as will entitle claimant to be paid the difference between cost plus reasonable profit and the amount actually received. (Port Deposit Quarry Co., Case No. 623, III these Dec., 122.)

Where it is established that there was an understanding between the Procurement Division and the Production Division of the Ordnance Department that the latter should act as the representative of the former in a program for increased facilities for the manufacture of pistols, urgently required, the action of the Production Division will be deemed to be the action of the Procurement Division as well. (Pratt & Whitney Co., Case No. 594, III these Dec., 450.)

Where an authorized agent of the Government ordered claimant, after it had finished an order then on hand, to continue to make faucets, not to exceed 50,000, so as to be ready for the next order, and the next order was never placed, and claimant did manufacture 30,000 of them, there is an agreement on the part of the Government to pay the expense incurred by claimant. (The Roberts Brass Manufacturing Co., Case No. 193, III these Dec., 71.)

Where claimants negotiated with officers of the Air Service for the lease of a building, to be constructed by claimants in the city of Washington, to be occupied as offices for the Air Service, but understood that such officers had no authority to execute a lease, and are urged by the officers to begin construction and to take a chance on the lease being executed, there is no agreement within the meaning of the act of March 2, 1919. (Walker & Johnson, Case No. 1931, III these Dec., 877.)

Where a packer is ordered by the Food Administration, acting as agent of the War Department, to set aside a certain proportion of canned tomatoes to meet the needs of the Army, and prices are thereafter fixed by the Federal Trade Commission and adopted by the War Department, there is an agreement within the terms of the act of March 2, 1919, covering all the goods reserved in accordance with such order. (Winfield Webster & Co., Case No. 478, III these Dec., 10.)

See also ALLOCATION; AMORTIZATION; CONTRACTS, CANCELLATION; CONTRACTS, IMPLIED; CONTRACTS, ORAL; CONTRACTS, PROMISE; CONTRACTS, SUPPLEMENTAL; CONTRACTS, WHAT CONSTITUTES; INSURANCE, PUBLIC LIABILITY; REIMBURSEMENT.

AGREEMENT.

See CONTRACTS.

ALLOCATION.

ALLOCATION BY AMERICAN IRON & STEEL INSTITUTE.

See CONTRACTS, WHAT CONSTITUTES.

ALLOCATION BY WAR INDUSTRIES BOARD.

Where a representative of the War Industries Board, acting under the direction of the Chief Signal Officer, gives an order to the contractor on the faith of which such contractor makes an allocation of material, the agreement is made within the authority, direction, or instruction of the Secretary of War within the meaning of the act of March 2, 1919. (B. F. Goodrich Rubber Co., Case No. 602, III these Dec., 1.)

Where claimant continuedly urged the War Industries Board to allocate to it a large quantity of pig iron, claimant not having sufficient

ALLOCATION—Continued.

business on hand to demand such a large quantity, but expecting to get sufficient business, and secured such allocation and by reason of the armistice the business was not secured, there is no agreement, express or implied, on the part of the Government to reimburse claimant its loss on the pig iron. (Isaac G. Johnson & Co., Case No. 625, III these Dec., 320.)

Where pig iron required by a certain manufacturer for war purposes was allocated to claimant at its request by the War Industries Board, such action in itself did not amount to an agreement under the act of March 2, 1919, to protect claimant against loss by reason of such allocation. An agreement is not to be implied from the mere fact that that board was in a position to enforce compliance with its allocations. (Pickands, Brown & Co., Case No. 1646, III these Dec., 843.)

See also CONTRACTS, WHAT CONSTITUTES.

ALLOTMENT.

See CONTRACTS, COST-PLUS.

ALLOWANCE FOR SPECIAL MACHINERY.

See CONTRACTS, CONSTRUCTION.

ALTERATION OF LOOMS.

See CONTRACTS, IMPLIED.

AMENDMENT.**AMENDMENT OF CLAIM.**

See CLAIMS, AMENDMENT.

AMENDMENT OF CONTRACT.

See CONTRACTS, AMENDMENT.

AMORTIZATION.**AMORTIZATION OF FACILITIES.**

Where claimant was possessed of a forging plant at the time it entered into an informal agreement with the Government for the manufacture of body forgings for shells, terminated by the Government after part performance because of the armistice, amortization in the value of such plant as the claimant had at the time it entered into the agreement is not an item of reimbursement which should be allowed. (An-niston Steel Co., Case No. 2248, III these Dec., 862.)

Where the claimant, at the request of the Government, agreed to create facilities and the capacity for the production of a certain amount of a certain article daily, and the Government agreed to purchase an undetermined amount of claimant's product at a price which would cover the amortization of claimant's expenditures necessary for creating said additional facilities, and where claimant's production was stopped before claimant had received a sufficient amount to cover said amortization, there resulted an implied contract to pay claimant the difference between the amount expended in developing said capacity and the present value of the facilities so procured, less amount already amortized. (Brown Co., Case No. 1753, III these Dec., 782.)

Where facilities were not bought in contemplation of the contract under which claim is made, but for the purpose of performing prior contracts, the cost of such facilities can not be amortized under the later contract. (Champion Ignition Co., Case No. 1816, III these Dec., 455.)

AMORTIZATION—Continued.

Where facilities were not specifically provided by the contractor for the performance of the contract and there was no express or implied agreement by the Government providing for their amortization, claimant is not entitled to reimbursement therefor or to the unabsorbed amortization thereon, under the act of March 2, 1919. (Denby Motor Truck Co., Case No. 1504, III these Dec., 1018.)

Where an authorized agent of the Government agrees with the manufacturer that if it will install special equipment for the manufacture of certain products a Government contract will be given it, and that the Government will reimburse its unabsorbed amortization of the cost of the special equipment, in the event war is terminated before the cost has been properly amortized, there is an agreement within the meaning of the act of March 2, 1919. (Detroit Chemical Works, Case No. 1643, III these Dec., 874.)

When contract was suspended, claimant was not entitled to continue production and thus increase the amount to be charged the United States. Claimant is entitled, however, to such amortization of the cost of its increased facilities as would have been accomplished if it had continued to produce toluol until the expiration of the period originally fixed. (The Peoples Gas Light & Coke Co., Case No. 1737, III these Dec., 664.)

Where, in order to encourage increased production and better sanitary conditions, a duly authorized representative of the Government agrees with the manufacturer that if it will obtain a three-year lease on certain floor space, move its factory therein, and install additional facilities, the Government will furnish sufficient work so that the extra expense can be absorbed in orders for its product, there is an agreement within the meaning of the act of March 2, 1919. (Jacob Reed Sons, Case No. 569, III these Dec., 828.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; CONTRACTS, IMPLIED; CONTRACTS, SUPPLEMENTAL.

ANTICIPATED ORDERS.

See CONTRACTS, ANTICIPATION.

ANTICIPATORY BREACH.

See JURISDICTION.

APPEAL.

APPEAL, QUESTIONS TO BE CONSIDERED.

See JURISDICTION.

APPEALS, TIME OF.

See JURISDICTION.

ARBITRATION OF LABOR DISPUTES WHERE NO CONTRACT PROVISION.

See CONTRACTS, IMPLIED.

ARTICLES IN PROCESS, TITLE PASSING.

See CONTRACTS, CONSTRUCTION.

ATTEMPTED SETTLEMENT PRIOR TO ACT OF MARCH 2, 1919.

See CONTRACTS, INVALID.

AUDITING SERVICE.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

AUTHORITY.**AUTHORITY OF AGENTS.**

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

AUTHORITY OF ORDNANCE DEPARTMENT.

See JURISDICTION.

AUTHORITY TO AMEND CONTRACTS.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

AUTHORITY TO CONTRACT.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

AUTOMOBILES.

See COSTS, LEGITIMATE.

AWARD.**AWARD BY ARBITRATION.**

See CONTRACTS, CONSTRUCTION.

AWARD CONSTITUTES AGREEMENT.

See CONTRACTS, WHAT CONSTITUTES.

AWARD, RECOMMENDATION.

A recommendation that claimant be awarded a contract is not an agreement within act of March 2, 1919. (Archibald Wheel Co., cases Nos. 1807-1808, III these Dec., 463.)

In the absence of an express agreement in the arbitration agreement requiring such reimbursement, and in the absence of a labor clause in the original contract, such recommendation does not impose any liability on the Government. (Eastern Malleable Iron Co., Case No. 2047, III these Dec., 691.)

See also CONTRACTS, PROMISE; CONTRACTS, RECOMMENDATION; CONTRACTS, WHAT CONSTITUTES.

B.**BASIS OF COMPENSATION.**

See COMPENSATION.

BOARD OF APPRAISERS, JURISDICTION.

See JURISDICTION.

BOARD OF CONTRACT ADJUSTMENT, JURISDICTION.

See JURISDICTION.

BONUS.**BONUS CLAUSE.**

Where a claimant received a clothing contract without a bonus clause and was thereafter informed that clothing contractors were entitled to a bonus for saving yardage by special care in cutting material, but did not use any extra care by reason of such notice, and on completion of this contract requested and received another contract for 1,931 garments in order to utilize the yardage saved on the first contract, claimant is not now entitled to payment of the bonus. (William F. Fretz, Case No. 512, III these Dec., 889.)

In Case No. 60 there was a bonus clause similar to the one in the case of Wanamaker & Brown, Case No. 2133 (II these Dec., 205); for the construction of the bonus clause see that case. (The Torrey-Epstein Co., Cases Nos. 60, 61, 62, 63, and 64, III these Dec., 17.)

BREACH.**BREACH, ANTICIPATORY.***See JURISDICTION.***BREACH BY CONTRACTOR.***See CONTRACTS, BREACH.***BREACH BY GOVERNMENT.***See CONTRACTS, BREACH.***BREACH OF CONTRACT.***See CONTRACTS, BREACH.***BREACH, WAIVER.***See WAIVER.***BUILDING CONTRACTS.***See REIMBURSEMENT.***BUSINESS RISK.**

Where claimant, while performing several contracts with the Government for the manufacture of shell steel and other munition products, purchased ferrosilicon in excess of the amount needed to complete said contract, it did so at its own risk, and under such circumstances no obligation arose, under the act of March 2, 1919, on the part of the United States Government to reimburse the claimant for its loss thereby sustained. (Midvale Steel & Ordnance Co., Case No. 1761, III these Dec., 911.)

*See also CONTRACTS, ANTICIPATION ; CONTROLLED INDUSTRY.***C.****CANCELLATION.****CANCELLATION AFTER SUSPENSION.***See CONTRACTS, SUSPENSION.***CANCELLATION OF CONTRACT.***See CONTRACTS, CANCELLATION.***CANCELLATION FOR DEFAULT.***See CONTRACTS, CANCELLATION.***CERTIFICATE OF FAIR VALUE.***See QUANTUM MERUIT.***CHANGE IN SPECIFICATIONS.***See CONTRACTS, IMPLIED.***CHILD-LABOR CLAUSE.***See CONTRACTS, INFORMAL.***CIRCUMSTANCES IMPLYING AN AGREEMENT.***See CONTRACTS, IMPLIED.***CLAIMS.****CLAIMS, AMENDMENT.**

An amendment to a claim, if intended to vary, amplify, or to remedy omissions or defects made in stating the original claim, may be allowed, and when allowed it relates back to the date of presenting or filing the original claim; but if under the guise of an amendment, a distinct claim, arising out of a different contract, is preferred, and such amended claim is first presented subsequent to June 30, 1919, it does not come within the relief given by act of March 2, 1919, and can not be entertained by this Board. (Chicago Cold Storage Warehouse Co., Case No. 2231, III these Dec., 20.)

See CONTRACTS, SETTLEMENT.

CLAIMS—Continued.**CLAIMS, DISMISSED.**

Where claimant has been paid after the filing of claim with this Board, the claim will be dismissed by this Board. (Mount Hope Finishing Co., Case No. 1692, III these Dec., 333.)

Claim is made under the act of March 2, 1919, Form B, for the purchase from claimant by the United States of certain material, at an aggregate price of \$157.25. Held, it appearing that said claim has been paid, it is dismissed. (The White Motor Car Co., Case No. 2420, III these Dec., 477.)

Claim is made under the act of March 2, 1919, in Form B, and is for the rental to the United States of one front service wheel. Held, that the claim having been paid same is now dismissed. (The White Motor Car Co., Case No. 2421, III these Dec., 478.)

CLAIMS, FILING.

A claim filed September 5, 1919, is not filed in accordance with the provisions of the act of March 2, 1919. (Chambersburg Hosiery Co., Case No. 1958, III these Dec., 482.)

Where a claim was not formally presented until after June 30, 1919, but was presented by invoices prior to that date, it was presented within the period fixed by the act of March 2, 1919. (Charlestown Sand & Gravel Co., Case No. 2166, III these Dec., 615.)

This Board has no jurisdiction under act of March 2, 1919, of a claim presented December 3, 1919. (William H. Lytell, Case No. 2293, III these Dec., 76.)

The last day for filing claims under the act of March 2, 1919, to wit, **June 29, 1919, falling on Sunday, the succeeding day, or June 30,** became the last day for filing claims within the meaning of said act. (H. N. White Co., Case No. 2164, III these Dec., 88.)

Where the claimant deposited his claim in the United States mail on the last day for filing, addressed to the proper tribunal, such claim should be deemed filed on said day within the provisions of the act of March 2, 1919. (H. N. White Co., Case No. 2164, III these Dec., 88.)

See also **CLAIMS, AMENDMENT; JURISDICTION.**

CLAIM FOR FACILITIES.

See **CONTRACTS, WRITTEN.**

CLAIM PAID AFTER FILING.

See **CLAIMS, DISMISSED.**

CLAIMS, SUBCONTRACTORS.

There can be no direct settlement of the claim of a subcontractor where there was no privity of contract between the Government and the subcontractor. (Engle & Hevenor, Case No. 1564, III these Dec., 774.)

A subcontractor who, in anticipation of promised orders from prime contractors, which orders are not forthcoming because of the armistice, incurs expense in increasing the facilities of his manufacturing plant, is not entitled to an adjustment under the act of March 2, 1919, where neither the subcontract nor the installation of additional tools and machinery was with the knowledge or approval of an agent of the Secretary of War. (Fisher Electrical Works, Case No. 1742, III these Dec., 339.)

Where claimant increased its facilities to enable it to perform a subcontract with a prime contractor, who had a Government contract,

CLAIMS—Continued.

and the prime contractor's contract with the Government was suspended, and it in turn terminated its subcontract with claimant, there is no contract, express or implied, between the claimant, the subcontractor, and the Government, whereby the Government should reimburse claimant for expenses incurred in increasing facilities. (Franklin Knitting Mills, Case No. 1763, III these Dec., 128.)

Where the prime contract has been fully performed, a subcontractor has no right, under the act of March 2, 1919, to file a claim against the Government based upon its contract with the prime contractor. (Harrison Radiator Corp., Case No. 1571, III these Dec., 570.)

Where claimant had a subcontract to do certain work upon a Government plant, and its contractor, in turn, had a contract for doing the work with the prime contractor of the Government, and during the progress of the work the prime contractor increased the wages of its employees, which caused claimant to increase the wages of its employees, there was no implied contract made by which the Government was obligated to pay claimant such increase of wages to its employees. (Lord & Burnham Co., Case No. 1772, III these Dec., 336.)

A subcontractor whose contract is breached because of the signing of the armistice has no agreement with the Government, and therefore can not present a claim against the Government under the act of March 2, 1919. (Milwaukee Patent Leather Co., Case No. 328, III these Dec., 376.)

Where claimant was sent an order from a prime contractor with the Government which it refused on account of the price, and an authorized Government agent requested claimant to take the order and the Government would make it right with claimant, and claimant did take the order and perform the contract, there is an agreement between claimant and the Government whereby the Government should reimburse claimant for the cost in excess of the amount paid by the prime contractor. (Parker Manufacturing Co., Case No. 2076, III these Dec., 549.)

In such case where the claimant receives and keeps but does not cash a conditional check sent it by the prime contractor, it is no bar to claimant's recovery from the Government for the excess. (Parker Manufacturing Co., Case No. 2076, III these Dec., 549.)

See also **CONTRACTS, WHAT CONSTITUTES; JURISDICTION; RELEASE.**

COAL DIVERSION.

See **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

COLLECTION AND CONVERSION OF PRICE BY GOVERNMENT AGENT.

See **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

COMMANDEERING ORDERS.

See **JURISDICTION.**

COMMISSARY.

COMMISSARY, MAINTENANCE AND OPERATION.

See **COSTS, LEGITIMATE.**

COMMITMENTS.

Where claimant, under a contract for the manufacture of woolen socks, orders from a subcontractor the quantity of wool required to fill its contract, but actually uses its own existing stock instead of part of

COMMITMENTS—Continued.

the wool which it had specially ordered, claimant is not entitled, on suspension of its contract, to payment for all the wool still undelivered by subcontractor, the proper basis of settlement being the amount of wool actually needed to fill the uncompleted portion of the contract. (Chambersburg Hosiery Co., Case No. 1958, III these Dec., 482.)

See also CONTRACTS, SUSPENSION; EXPENSES, OVERHEAD.

COMMITMENTS, PRIOR.

See CONTRACTS, ANTICIPATION.

COMPENSATION.**COMPENSATION, BASIS OF.**

Where claimant, during the time of the performance of said contract, at the request of the contracting officer, performed additional work, which the contracting officer had no right to call for under the terms of the written contract, the understanding being that he was to be paid therefor in accordance with the scale set out in the original contract, there arose under the circumstances of the case an implied agreement upon the part of the United States, within the purview of the act of March 2, 1919, to pay claimant a fee for such additional work, to be determined by the scale of fees and percentages and other provisions modifying the same, identical with such scale and provisions contained in the written contract, based upon the total cost of all work done, which fee should be ascertained by adding the cost of the work done under the written contract to the cost of the additional work and applying this total to the appropriate percentage found in such schedule, subject to any other provision identical with those contained in the written contract modifying such percentage. (Selden Breck Construction Co., Case No. 1984, III these Dec., 485.)

Where an implied contract did not express the manner of paying and the amount of claimant's compensation, and said additional work was of the general character as that done under the original contract, and was performed under the instructions of the construction officer, and in accordance with the maps, plans, and specifications described in the original contract, it will be implied that the parties agreed, as a part of said implied contract, that claimant was to be compensated in the same manner and upon the same basis as provided in the original contract for performing the same. (The J. G. White Engineering Co., Case No. 1895, III these Dec., 289.)

See also CONTRACTS, CONSTRUCTION; CONTRACTS, IMPLIED.

COMPLETED CONTRACTS.

See JURISDICTION.

COMPLIANCE WITH GOVERNMENT ORDER.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

COMPILED STATUTES.

COMPILED STATUTES, SEC. 6853b.

See CONTRACTS, FORMAL.

COMPILED STATUTES, SEC. 6854.

See CONTRACTS, INFORMAL.

COMPULSORY ORDERS.

See QUASI CONTRACTS.

CONFIRMED DECISIONS.*See* DECISIONS, AFFIRMED.**CONFLICT BETWEEN WITNESSES.***See* EVIDENCE.**CONFUSION OF ORDERS.***See* QUANTUM VALEBAT.**CONSTRUCTING QUARTERMASTER, AUTHORITY.***See* AGENTS, AUTHORITY TO BIND GOVERNMENT.**CONSTRUCTION.****CONSTRUCTION IN LIGHT OF CONTEXT.***See* CONTRACTS, CONSTRUCTION.**CONSTRUCTION OF CONTRACT.***See* CONTRACTS, CONSTRUCTION.**CONSTRUCTION OF ELECTRIC POWER LINE.***See* AGENTS, AUTHORITY TO BIND GOVERNMENT.**CONSTRUCTION OF LABOR DISPUTE CLAUSE.***See* CONTRACTS, CONSTRUCTION.**CONSTRUCTION OF TERMINATION CLAUSE.***See* CONTRACTS, CONSTRUCTION.**CONTEMPORANEOUS ORAL STATEMENTS.***See* CONTRACTS, WRITTEN.**CONTRACT PRICE.**

- Where claimant had a formally executed contract to supply hay to the Government at Camp Gordon, Ga., and actually consigned a carload to that camp, but for some unknown reason the hay was delivered at Camp Lee, Va., and used there at a time when the market price was higher than the contract price, claimant is entitled to receive the market price prevailing at Camp Lee at the time when the hay was thus taken by the Government. (Dewey Bros. Co., Case No. 1224, III these Dec., 244.)

Where a purchase order for tomatoes fixes a provisional price, and the tomatoes are delivered to, accepted, and paid for by the Government at the provisional price, and a Food Administration bulletin provides that the tomatoes so accepted will be paid for in full at zone prices fixed by the Food Purchase Board, and that if the packer is dissatisfied, he may protest the same and be paid at the actual cost of production, to be ascertained by the Federal Trade Commission, plus a fair profit to be fixed by the Food Purchase Board, the bulletin furnishes the proper rule under which an adjustment of the final price should be made. (R. M. Messick & Sons, Case No. 2395, III these Dec., 1007.)

Where the packer protests the zone price, and under the terms of the bulletin the packer is allowed and paid an additional sum, and signs a receipt reciting payment in full, and thereafter claims the receipt was signed under duress, of which there is no evidence, and claims that the settlement was arrived at by computation on an erroneous basis, of which basis he had full knowledge when he signed the receipt, claimant is not entitled to have the settlement reopened. (R. M. Messick & Sons, Case No. 2395, III these Dec., 1007.)

Where a Food Administration bulletin provides an allowance for storage on tomatoes not ordered shipped before December 1, 1918, and claimant received shipping order November 1, 1918, claimant is not entitled to reimbursement of storage charges, although the purchase

CONTRACT PRICE—Continued.

order was not issued as early as claimant anticipated. (R. M. Messick & Sons, Case No. 2395, III these Dec., 1007.)

Where certain items were not paid for by reason of having the wrong number, and it appears that the contract provided for a unit price of 10 cents, and the catalogue provided for a unit price of 60 cents, and there was no waiver as in the case of the other items, the contractor may be paid according to the unit price of 60 cents, which is deemed to be the correct price according to the intent of the parties. Splitdorf Electrical Co., Case No. 2313, III these Dec., 511.)

See also **CONTRACTS, CONSTRUCTION: CONTRACTS, COST-PLUS; CONTRACTS, IMPLIED; CONTRACTS, PERFORMANCE.**

CONTRACT, PRIVILEY.

See **SALES.**

CONTRACTS.**CONTRACTS, ADJUSTMENTS.**

The contractor will be permitted to deliver the puttees which the Government has heretofore refused, but from the contract price will be deducted the saving effected by the substitution of cotton for wool, and also the additional cost, if any, as provided in the contract, of inspecting some of the puttees in the delivery of which claimant has been delinquent. (Bates & Innes (Ltd.), Case No. 298, III these Dec., 262.)

Where in relation to construction of railroad trackage to and on an aviation training camp, the Government is under direct or primary obligation to the claimant for cost of construction of part thereof and is under indirect or secondary obligation to the railroad for cost of the whole trackage, this Board recommends to the Claims Board, Air Service, that the entire matter be adjusted by means of a tripartite agreement between the Government, the claimant, and the railroad. For facts and decision in this case see the opinion of the Board, August 18, 1919, I these Dec., 558. (Chamber of Commerce, Montgomery, Ala., Case No. 1661, III these Dec., 7.)

Where a duly authorized agent of the War Department gave claimant an oral order for articles to be manufactured in the amounts and at the prices stated in claimant's written offer, with instructions to proceed without waiting for a formal contract, and claimant manufactured the articles before November 12, 1918, claimant is entitled to recover the contract price of the articles less their reasonable salvage value. (Oliver Iron & Steel Co., Case No. 739, III these Dec., 193.)

Where an informally executed contract was suspended at the signing of the armistice the adjustment of any claim thereunder against the United States is governed by the act of March 2, 1919, which expressly excludes reimbursement for prospective profits. Claimant is therefore not entitled to be paid the difference between the contract price and the cost to the claimant of completing the contract, as such a basis of settlement would include prospective profits. (Pressed Steel Car Co., Case No. 2017, III these Dec., 384.)

See also **AGENTS. AUTHORITY TO BIND GOVERNMENT; CONTRACTS, CANCELLATION.**

CONTRACTS AFTER NOVEMBER 12, 1918.

Formal contract and expenditures having been made after November 12, 1918, claim should be dismissed, as no relief can be granted under

CONTRACTS—Continued.

act of March 2, 1919. (F. A. Cigol Rubber Co., Case No. 1670, III these Dec., 335.)

Where claimant alleged that on November 10, 1918, its representative in Washington was informed that a contract had been awarded to claimant, but is unable to furnish the name of the officer or agent of the Government who gave its representative this information, and on November 14, 1918, written notice of a contract was mailed, there was no agreement made prior to November 12, 1918, as required by the act of March 2, 1919. (E. Leitz (Inc.), Case No. 1796, III these Dec., 388.)

See also JURISDICTION.

CONTRACTS, AMENDMENT.

Claimant had a written contract for the manufacture of woolen puttees, specifying that its product was to be similar in all respects to sample and the sample submitted by claimant contained practically no cotton, but shortly thereafter claimant's agent was shown proposed specifications for puttees which contained 10 per cent of cotton, which specifications were subsequently adopted by the Quartermaster General and copies thereof mailed both to claimant and to the Government inspector at claimant's plant, whereupon claimant commenced to manufacture puttees containing 10 per cent of cotton under the contract previously awarded. Held, that this was a request of the Government to amend the contract and was accepted by the contractor by performance. (Bates & Innes (Ltd.), Case No. 298, III these Dec., 262.)

See also CONTRACTS, LACK OF CONSIDERATION; JURISDICTION.

CONTRACTS, ANTICIPATION.

In the absence of an agreement claimant is not entitled to reimbursement for expenditures made in anticipation of obtaining a contract. Notice that the award of a contract had been recommended does not amount to an agreement. (Adams Woolen Mills (Inc.), Case No. 673, III these Dec., 561.)

In the absence of an agreement, claimant is not entitled, under the act of March 2, 1919, to reimbursement for expenditures made in anticipation of obtaining a contract. A recommendation that claimant be awarded a contract is not an agreement. (Aluminum Goods Manufacturing Co., Case No. 566, III these Dec., 514.)

Where claimant made expenditures for labor, material, and facilities, preparatory to performing a contract to manufacture 30,000 pair of trousers for the United States Government at 75 cents each, there is no obligation under the act of March 2, 1919, to reimburse claimant for its loss in such expenditures where the evidence shows that no such contract was made. (Apfelberg, Rosenblatt & Co., Case No. 1877, III these Dec., 190.)

Where claimant made commitments, installed machinery, and did experimental work in anticipation of future Government contracts, which it did not obtain, such expenditures not being authorized by an authorized agent of the Government, there is no agreement, express or implied, on the part of the Government to reimburse claimant. (Butler Manufacturing Co., Case No. 742, III these Dec., 46.)

Where claimant was advised that it had been recommended for an award of a contract to manufacture 20,000 woolen coats at \$1.49

CONTRACTS—Continued.

each, and where no such award was ever made, the United States Government is under no obligation to reimburse claimant, under the act of March 2, 1919, the expenses incurred preparatory to performing the anticipated contract. (Consolidated Manufacturing Co., Case No. 1843, III these Dec., 574.)

Where a manufacturer had a plant which it had used in the performance of a Government contract for the production of dehydrated potatoes, and thereafter, in anticipation of further contracts, made alterations in its plant prior to the time it entered into the contract, under which damages are claimed, the expense of said alterations can not be said to come within the provisions of Supply Circular 111 so as to entitle claimant to an adjustment under the act of March 2, 1919, as facilities specially provided for the performance of the contract. (The Drying Systems (Inc.), Case No. 1827, III these Dec., 1032.)

Where claimant kept its factory idle while waiting to perform future Government contracts it is not entitled, under the act of March 2, 1919, to reimbursement of loss thereby sustained in the absence of evidence showing that it was promised or given such future contracts. (High Clothing Co. (Inc.), Case No. 471, III these Dec., 935.)

Where a Government agent told an aeroplane manufacturer that if it would demonstrate its ability to produce satisfactory aeroplanes in production quantities, and satisfy the Procurement Division that its company was financially able to go through with the contract, he would recommend it for an award, and that an officer of the Procurement Division told claimant company it would have to show a deposit of \$80,000 before they would give it a contract, and claimant company did so qualify in November, but the contract was not placed by reason of the armistice, there is no agreement, express or implied, whereby the Government is obligated to reimburse claimant for the amount expended in preparation. (The Lawson Aircraft Corporation, Case No. 247, III these Dec., 790.)

Where payment is sought by claimant for expenditures, all of which were made several months before the making of alleged informal contracts with the Government, the expenditures were not made upon the faith of said alleged contracts, and it is immaterial to ascertain whether or not said contracts were entered into as alleged. (Leopold-Morse Co., Cases Nos. 645, 1873, III these Dec., 654.)

Where claimant, who had completed two Government contracts for the manufacture of blankets, purchased shoddy to be used in the manufacture of blankets in anticipation of Government contracts, and had such shoddy on hand when it submitted a bid for an additional contract, and is informed that its acceptance has been recommended, but the bid is not formally accepted, and no contract is entered into nor orders issued for blankets to claimant, and claimant had made expenditures or incurred obligations, when on November 11 claimant received further instructions not to make any preparations to perform, claimant is not entitled to an adjustment. (Niantic Manufacturing Co., Case No. 394, III these Dec., 565.)

Where claimant developed a waterproof glue satisfactory to the Government after experiments conducted in part in connection with

CONTRACTS—Continued.

and under the direction of representatives of the War Department, and relying upon statements of representatives of the War Department that large quantities of such glue would be required in the production of airplanes, incurred expenses in experimenting and developing the glue and for special equipment for its manufacture, and manufactured a quantity thereof, which it had on hand at the time of the armistice, claimant is not entitled to reimbursement in the absence of an agreement, express or implied. (Perkins Glue Co., Case No. 2186, III these Dec., 1004.)

Where a contractor purchased materials with which to fill anticipated Government orders, there is no liability on the Government to reimburse the contractor on account of loss on such materials in the absence of an agreement, express or implied. (Frank B. Perry & Sons, Case No. 1183, III these Dec., 970.)

Where a contractor, in anticipation of Government contracts, erects a building in which to assemble product, there is no liability on the part of the Government to reimburse the contractor the expense of said building. (Frank B. Perry & Sons, Case No. 1183, III these Dec., 970.)

Where claimant requested aid of an officer of the Procurement Division, Quartermaster Corps, to obtain a sufficient supply of natural gas, in order to enable claimant to prepare for filling anticipated Government contracts for making lantern globes, and no orders were afterwards given to the claimant for making globes and no instructions given to proceed, there was no contract made within the provisions of the act of March 2, 1919, and claimant, in making the expenditures in preparing for anticipated contracts, assumed an ordinary business risk. (Radiant Glass Co., Case No. 272, III these Dec., 41.)

In the absence of an agreement, a claimant is not entitled under the act of March 2, 1919, to reimbursement for expenses incurred in anticipation of a contract. The fact that claimant, while performing an existing contract, was urged by a Production officer to make prompt deliveries in order to secure future orders, is no basis for an implied agreement, nor is the mere fact that claimant at its own solicitation was given priority orders to facilitate purchase of machinery. (Rajah Auto Supply Co., Case No. 1172, III these Dec., 356.)

Unless there was an agreement, express or implied, so to do, the United States Government is under no obligation, under the act of March 2, 1919, to reimburse claimant's loss sustained in enlarging its plant and increasing its facilities to do Government work, even though it was given assurance that it would be recommended for future contracts. (Ritch & Grasheim, Case No. 1912, III these Dec., 531.)

In such a case, where it appears that the materials intended to be used in performing this contract were purchased prior to the oral contract, there is no obligation on the Government to reimburse claimant for loss on such commitments, as they were not purchased "upon the faith of the same." (Sanford Narrow Fabric Co., Case No. 1984, III these Dec., 522.)

A strong representation of Government needs by a representative of the War Industries Board, accompanied by advice to lay in sufficient supplies for the manufacture of glass to last through the winter of 1918-19, does not constitute an agreement within the purview of the

CONTRACTS—Continued.

act of March 2, 1919, to reimburse the claimant expenditures made in anticipation of future orders. (Spencer Lens Co., Cases Nos. 1475P and 1647P, III these Dec., 1014.)

Where a plant was erected in anticipation of Government orders but not in pursuance of any agreement providing for amortization, claimant is not entitled to reimbursement on account of the erection of the plant. (The Tilton Optical Co., Case No. 1586, III these Dec., 1011.)

Where a claimant is unable to show that any work was done under an alleged contract or that any expenditures or commitments were made on the faith of the contract, claimant is not entitled to relief under the act of March 2, 1919. (Urfit Pants Co., Case No. 2008, III these Dec., 870.)

Where a manufacturer is engaged in the execution of a Government contract for the manufacture of munitions in a certain building, and in anticipation of additional contracts it moves its plant to a larger building, in the absence of an agreement, express or implied, for reimbursement for the expense of moving its plant, it is not entitled to recover such expense from the Government. (L. Wolff Manufacturing Co., Case No. 2274, III these Dec., 981.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; CLAIMS, SUBCONTRACTORS; EVIDENCE; REIMBURSEMENT.

CONTRACTS, BREACH.

Where claimant's contract to furnish the Government certain enamel cast-iron articles was canceled by the Government by reason of claimant's breach, there is no obligation on the part of the United States Government to reimburse claimant, under the act of March 2, 1919, for loss sustained in connection therewith. (Elyria Enameled Products Co., Case No. 1581, III these Dec., 468.)

Where a contractor manufactured the goods ordered by the Government but the latter refused to take them on account of the armistice, whereupon the contractor sold them to private dealers for the same price as the Government had agreed to pay, claimant is entitled to its actual reselling costs. Stated in another way, claimant is entitled to the difference between the contract price and the fair value of the goods, which fair value is the price realized, less the actual cost of reselling the goods. (Leo H. Hirsch & Co., Case No. 2370, III these Dec., 1021.)

Where a contract provides certain options which may be exercised by the United States in case of breach by the contractor, the United States must act with reasonable promptness, after knowledge of a breach, if it desires to take advantage thereof; otherwise the breach is waived. (Taft-Pierce Manufacturing Co., Case No. 2375, III these Dec., 323.)

Where a formal contract has been terminated, and it appears that the Government has a counterclaim against the contractor for a breach, this Board is without jurisdiction. (United Disposal & Recovery Co., Case No. 2397, III these Dec., 815.)

See also COSTS, RESELLING; JURISDICTION WAIVER.

CONTRACTS, CANCELLATION.

Where claimant received an order canceling a previous order for South American corned beef, which cancellation order excluded goods which were afloat, the Government is bound to accept and pay the

CONTRACTS—Continued.

- contract price for a cargo which was loaded prior to, but sailed one day after, the cancellation. (Armour & Co., Case No. 2278, III these Dec., 173.)
- Where contract, as amended, gave claimant 40 days from date of contract to commence deliveries, such contract could not be canceled for nondelivery before the expiration of such time. (Atlas Cabinet Co., Case No. 2374, III these Dec., 647.)
- Where a contract provided for the cancellation by the Government of any part thereof at any time and for the payment to the contractor of the cost of materials on hand at the time of cancellation and where the Government's representatives after canceling the contract procured a purchaser for such materials, there was a substantial compliance on the part of the Government with the cancellation clause of the contract. Claimant, having refused so to dispose of the materials, is not entitled to reimbursement for part of the materials still left on its hands. (Louis Bossert & Sons (Inc.), Case No. 1883, III these Dec., 1023.)
- The claim that the obligation of the Government under the above circumstances was recognized or revived by representatives of the Government in the course of subsequent negotiations is without merit because the obligation was discharged when claimant refused to sell the materials and could not be revived by any action or promise of the Government's representatives. (Louis Bossert & Sons (Inc.), Case No. 1883, III these Dec., 1023.)
- Where claimant enters into a contract with the Government to purchase certain manufactured articles and thereafter, by mutual agreement, this contract is canceled, the Government is not liable for material theretofore procured to perform said contract, notwithstanding the fact that at the time of cancellation claimant was told that, in view of such cancellation, it would be given special preference in the event of future orders being placed for similar articles. (Gould-Mersereau Co., Case No. 367, III these Dec., 955.)
- Where under the terms of its contract claimant was in default in delivery, a notice from the Government to suspend operations would have constituted a waiver of the Government's right under the contract to rescind the contract, if the notice was sent with full knowledge of the facts. Since the contract was suspended without such knowledge, the suspension, being without prejudice to the rights of either party, does not now prevent the Government from canceling the contract for claimant's default. (Hartford Machine Screw Co., Case No. 1566, III these Dec., 859.)
- Where the price of certain airplane stabilizers fixed in an oral agreement with an authorized representative of the Government is understood to be based, in part, upon previous experimental and development expenses, under the direction of authorized representatives of the Government, and where after the delivery of two stabilizers, which are paid for at the contract price, the contract is canceled, and a partial award made and accepted in which the question as to the liability of the Government for such expense is left open, the contractor is entitled to recover only such part of the preliminary engineering and development work as is directly applicable to the order on which the claim is based. (Macy Engineering Co., Case No. 32, III these Dec., 330.)

CONTRACTS—Continued.

Where a contractor fails to deliver according to the terms of the contract, the Government has a right to cancel the contract by reason thereof, and the contractor's excuse that the reason it failed to deliver was that it used the hay to fill other Government orders will not avail claimant. (The Shoemaker Co., Case No. 344, III these Dec., 148.)

See also **CONTRACTS, BREACH**; **CONTRACTS, CONSTRUCTION**; **CONTRACTS, SUSPENSION**; **CONTRACTS, TERMINATION**; **COSTS, EXPERIMENTAL**; **JURISDICTION**; **WAIVER**.

CONTRACTS, COMPLETED.

See **JURISDICTION**.

CONTRACTS, CONSIDERATION.

Where a representative of the War Industries Board promised a manufacturer to furnish raw linters at a certain price if the manufacturer would sell certain bleached linters it had on hand for delivery to the Canadian Government, which the manufacturer agreed to do, but which bleached linters were rejected by the munitions contractor because such bleached linters did not meet the specifications, and a new agreement was entered into between claimant and the munitions contractor whereby claimant was to furnish entirely different bleached linters, thus leaving the claimant possessed of the linters which he was requested by the Government to sell to the munitions contractor, there is a failure of consideration for the agreement by the War Industries Board to furnish raw linters at the fixed price, and claimant can not recover the difference between the price so fixed and what it was compelled to pay for linters in order to fill the subsequent agreement with the munitions contractors. (The Liberty Cotton Oil Co., Case No. 736, III these Dec., 633.)

Where a contractor has a formal contract with the Government for the making of wool trousers at 65 cents per pair, and during the performance the contractor complains about the price, and the Chief of the Clothing Section writes the contractor that the price will be raised to 75 cents per pair, there is no binding contract relative to the raise, for the reason that the amendment is without good consideration moving to the Government and beyond the authority of the officer to make. (A. Mendelson & Bro., Case No. 1732, III these Dec., 260.)

CONTRACTS, CONSTRUCTION.

Where a contract expressly provides that labor disputes may be submitted to the Secretary of War for settlement and that if such settlement results in a readjustment of wages there should be a readjustment of the price of the manufactured articles, an award by the War Labor Board which resulted in increasing labor costs and its direction that the contractor be reimbursed constitutes such a settlement as was contemplated by the contract, and the contractor is entitled to receive reimbursement of the additional labor costs. (American Tube & Stamping Co., Case No. 1979, III these Dec., 709.)

Where a contract provided that any increase in labor costs should entitle the manufacturer to a readjustment of the price of the manufactured article, and that, in case the parties to the contract could not agree on such readjusted price, such price should be fixed by the Board of Arbitration of the War Department, an award of the War

CONTRACTS—Continued.

Labor Board constituted this readjustment of price within the terms of the contract. (Bridgeport Hardware Manufacturing Co., Case No. 2407, III these Dec., 713.)

Where a contract provides that on termination by the Government, the Government shall pay for raw materials and articles in process of manufacture, which the contractor has on hand for the contract at the time of termination, and that "any raw materials, articles in process of manufacture, and other property so paid for, shall become the property of the United States," and notice of termination is given, such notice has the effect of a notice to the contractor that the Government will pay for and take title to the raw material and partly finished product, and operates as a contract of sale under which title to the property vests in the Government. (Canada Wire & Cable Co. (Ltd.), Case No. 2319, III these Dec., 236.)

Where for the purpose of interesting manufacturers in the production of steel helmets a duly authorized representative of the Government, at a meeting of manufacturers, including the claimant, states that the Government will make an allowance to such manufacturers as are chosen as contractors, and several manufacturers are so selected, claimant, who is not so selected, but who afterwards at its earnest solicitation obtains an experimental order, in which no mention of such allowance is made, is not entitled to such allowance. (Canton Metal Ceiling Co., Case No. 1743, III these Dec., 785.)

Where the contract contains a cancellation clause requiring the United States, in case it terminates the contract, to reimburse the contractor for a proportionate part of its expenditures in connection with its performance "other than expenditures for plant, facilities, and equipment provided for the performance of this contract," contractor is not entitled to an adjustment for special tools in the nature of equipment used in performing the contract. (Champion Ignition Co., Case No. 1816, III these Dec., 455.)

Where a labor-dispute clause in a contract provided that the Secretary of War might, in his discretion, direct that fair and just compensation be made in case the contractor is required by the settlement made by the Secretary of War to pay labor costs higher than those prevailing prior to such settlement, but that no claim for additional compensation should be made unless the same was ordered in writing by the Secretary of War, the ordering of an addition to the contract price is a matter of discretion. (Cohen-Goldman & Co., Cases Nos. 2182 and 2159, III these Dec., 801.)

This clause means that the Secretary of War at the time of his settlement of a labor dispute may, at his discretion, direct such addition to the contract price, and since the Secretary of War did not at that time exercise his discretion it must be inferred that in his judgment the facts justified no addition to the contract price. (Cohen-Goldman & Co., Cases Nos. 2182 and 2159, III these Dec., 801.)

If it is suggested that it be recommended that the discretion of the Secretary of War should now be exercised it must be held that claimant is not entitled to this additional compensation because the wages paid its employees were below the standard rates for similar work in the vicinity of claimant's plant and no facts have been submitted to warrant the additional compensation. (Cohen-Goldman & Co., Cases Nos. 2182 and 2159, III these Dec., 801.)

CONTRACTS—Continued.

Where a construction contract provides that the contractor shall pay to the Government interest on the total net sum provided by the Government toward the construction of a power plant and transmission line, from the time of completion and when the monthly bills for electricity used by the Government equal or exceed a certain sum, it was not the intention of the parties that interest should be paid until the Government was in a position to consume and to continue to consume for a substantial period the amount stipulated, and the use of electricity by intentional waste for the purpose of fixing the time when interest should begin to run is not authorized by the contract. (Charleston Consolidated Railway & Lighting Co., Case No. 2467, III these Dec., 1039.)

A clause of a written contract is to be construed in the light of its context. So where a contract for the construction of a cantonment provides that the Government shall reimburse the contractor for the cost of the work, specifying *inter alia* "such losses and expenses not compensated by insurance," and the contractor incurred expenses in successfully defending certain damage suits. Held, that such expenses were not covered by the above-quoted clause, construed in the light of its context, which related to bonds and various kinds of insurance. (Hardaway Contracting Co., Case No. 1959, III these Dec., 80.)

Where a contract for the construction of a chimney provides that the Government will guarantee the free and unobstructed use of a railroad siding so that the materials may be unloaded from cars within 100 feet of the chimney site, and while the cars are so unloaded, yet, it is necessary to haul the materials by way of a detour for a distance of 300 feet, claimant is entitled to be reimbursed for transporting the materials from the cars to the chimney site, but not the cost of unloading. (Heine Chimney Co., Case No. 2160, III these Dec., 900.)

Where claimant entered into a formal written contract with the United States Government to purchase and remove "all waste matter of every kind and nature, except rags, bags, manure, and cinders," at Camp Gordon, such words as used in the contract include all such matter as is generally called "waste matter," and the United States Government is indebted to the claimant in the amount received from the sale of such waste matter at such camp prior to June 30, 1918, the expiration of claimant's contract, and claimant is entitled to such waste matter as had accumulated prior to that date and is still at said camp undisposed of. (Henry Knight & Sons (Inc.), Case No. 1736—Part I, III these Dec., 397.)

Where claimant was manufacturing certain articles for the Quartermaster Corps, under a proxy-signed contract and afterwards entered into a supplemental contract, whereby the original contract was modified by decreasing the number of articles to be taken by the Government, and by making other changes, and said supplemental contract contained a clause providing a mutual release by each party in favor of the other of all claims arising out of the modification of the original contract, the apparently repugnant provisions of the supplemental contract should be reconciled and the contract construed to give effect to all its provisions, and applying said principle, it is Held, that by the terms of said supplemental contract the Gov-

CONTRACTS—Continued.

ernment was released from all obligations except those imposed by the modified or supplemental contract. (Lambertville Rubber Co., Case No. 1839, III these Dec., 479.)

Where a formal contract containing a termination clause is terminated in compliance therewith, the contractor is not entitled to reimbursement for items not mentioned in or contemplated by such termination clause. (A. E. Little Co., Case No. 1477, III these Dec., 765.)

Parties making a parol contract may by appropriate reference make documents a part of the same; and where the claimant and the Government entered into parol contract for the manufacture of oil drums and it was provided therein that the drums should be made according to the Interstate Commerce Commission Specifications No. 5 and said specifications were in writing, they were by such reference made a part of the contract. (Nebraska & Iowa Steel Tank Co., Case No. 1691, III these Dec., 422.)

Where claimant had a written contract to construct upon a cost-plus basis a one-unit two-squadron training school complete, in accordance with certain plans and specifications which were made a part of the contract, and which contract set out a scale of percentages and amounts to be paid claimant for such work, based upon the cost thereof, but fixed the maximum fee at \$70,000, the provision in the contract which authorized the contracting officer to make changes in the plans and specifications and to call for additional work gave to the contracting officer the right to call merely for such changes in the plans and specifications and for such additional work as was necessary and incidental to the completion of the work in accordance with the general plan. (The Selden Breck Construction Co., Case No. 1894, III these Dec., 485.)

Where a contract provided that it might be canceled by the Government on 15 days' notice, the Government could either cancel the contract, in which case it would have to pay for all the goods the claimant could manufacture during the 15 days, or suspend the contract with the consent of the contractor, in which case it would have to reimburse the claimant its losses in accordance with Supply Circular No. 111. (Standard Oil Co. of Indiana, Case No. 371, III these Dec., 743.)

Where claimant had a formal written contract for the manufacture of raincoats, which provided that in the case of labor disputes the Government might appoint an arbitration committee, whose decision should be binding on the contractor and the Government, and during the performance of the contract there was a labor dispute, and the Government appointed an arbitration committee, which committee increased the pay of the employees, but where, through a typographical error, the name of claimant was omitted, claimant should seek to have the arbitration committee amend the award so as to include claimant's name and then present proper vouchers to the finance officer for payment in the usual manner. (Stowe & Woodward Co., Case No. 545, III these Dec., 195.)

Under a cost-plus contract the Government is not responsible for failure of claimant's employees to collect certain sums due claimant from its own workmen. (Twohy Bros., Case No. 1859, III these Dec., 946.)

CONTRACTS—Continued.

Where the termination clause in a formally executed contract provided for reimbursement for expenditures "other than expenditures for plant facilities and equipment provided for the performance of this contract" claimant is not entitled on suspension of contract to reimbursement for special tools, patterns, dies, and jigs provided by claimant for the performance of its contract. (Universal Machine Co., Case No. 2040, III these Dec., 753.)

See also CONTRACTS, COST-PLUS; CONTRACTS, FORMAL; CONTRACTS, SUPPLEMENTAL; COSTS, LEGITIMATE; INTENTION OF PARTIES; QUASI CONTRACTS.

CONTRACTS, COST-PLUS.

Where claimant agreed to pay the Government price for all pig lead allotted to it for the purpose of manufacturing sheet lead and lead pipes for Edgewood Arsenal and sell it back to the Government at the cost price plus the cost of converting it into the articles manufactured for the Government, there arose an implied obligation, under the act of March 2, 1919, to reimburse claimant for his loss occasioned by having on hand a surplus allotment when its contract for the manufacture of the articles was suspended. (James Robertson Lead Works, Case No. 1810, III these Dec., 686.)

Where claimant entered into a contract to do the construction work on the aeronautical station at Langley Field, Va., on the cost-plus plan, the Government paying for labor and material, and where such contract fixed claimant's maximum fee at \$250,000, the claimant is not entitled, under the act of March 2, 1919, to a larger fee than the maximum fee fixed by the contract, where he did no work that he could not have been required to do under the contract. (The J. G. White Engineering Co., Case No. 1896, III these Dec., 618.) Claim under act of March 2, 1919, for \$3,083.23 for commitments on oral contract for reclaiming shells. Held, agreement was made for reclaiming 30,000 shells on a cost-plus 10 per cent basis. (United States Ammunition Co., Case No. 185, III these Dec., 526.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; COSTS, LEGITIMATE.

CONTRACTS, FORMAL.

When purchase orders for goods of less value than \$25,000, for immediate delivery, are issued by authority of the Quartermaster General, they become formal contracts under Compiled Statutes, section 6853b, and the Regulations of the Quartermaster General. (Q. M. G. Notice No. 28, July 19, 1918; Q. M. G. Notice 189, Oct. 15, 1918.) (E. C. Gatlin Importing Co., Case No. 661, III these Dec., 757.)

The law (R. S., secs. 3744-3745) neither requires nor contemplates that an affidavit should be affixed to the original contract. If it is affixed to a copy thereof, that is sufficient. Where a contract between the Government and a contractor has been duly signed by the contractor and the authorized officer, the same is rendered binding on both parties, such signatures being in full compliance with the provisions of section 3744 and 3745, Revised Statutes. (The National Laundry Co., Case No. 1, III these Dec., 585.)

See former decision of the Board, Volume III, page 585. (National Laundry Co., Case No. 1, Rehearing, III these Dec., 593.)

CONTRACTS—Continued.

Where there is a doubt as to the construction of such written formal contract or a question as to whether the United States Government has paid all that it is under obligation to pay, in accordance with the terms thereof, the Board of Contract Adjustment has jurisdiction under General Order 103 of 1918 to advise the Secretary of War as to his duty in such case and as to what are the legal obligations of the United States Government under such contract. (Henry Knight & Sons (Inc.), Case No. 1736—Part I, III these Dec., 397.)

Where claimant in manufacturing a certain article for the Government, under formal contract at a certain unit price and said contract provided for an overrun of 5 per cent on the total number of articles required to be produced, and said amount of overrun was delivered to and accepted by the Government, the claimant is entitled to be paid for same at the unit price named in the contract. (J. Thompson Riday & Son Co., Case No. 360, III these Dec., 763.)

Where four separate purchase orders for hay, each amounting to less than \$25,000, to be delivered within 30 days, were given to and accepted by claimant, there is a formal contract, and a claim alleged to be based upon them is not a claim within the purview of the act of March 2, 1919. (The Shoemaker Co., Case. 344, III these Dec., 148.)

Where a purchase order is executed according to law and goods are delivered under it to the Government, but are thereafter returned, and a dispute arises as to the terms of settlement, there is a controversy for the Board to determine under G. O. 103. (Wallace & Tiernan Co., Case No. 1828, III these Dec., 171.)

See also CONTRACTS, CONSTRUCTION; CONTRACTS, IMPLIED; CONTRACTS, INVALID; CONTRACTS, SUSPENSION; CONTRACTS, WRITTEN; EVIDENCE; JURISDICTION.

CONTRACTS, IMPLIED.

Where claimant in the absence of a contract provision agreed to submit labor disputes to the National War Labor Board and submit to its findings, labor also agreeing to do the same, and the National War Labor Board rendered a decision granting an increase in wages, and claimant paid the increase according to such decision, there is no implied agreement on the part of the Government to reimburse claimant wages so paid. (American Tube & Stamping Co., Case No. 1979, III these Dec., 709.)

No agreement to reimburse a contractor for machinery and equipment is to be implied from a representation of Government needs, followed by a request to hasten production under an existing contract and submit bids for another contract. (Angelica Jacket Co., Case No. 2064, III these Dec., 930.)

Where claimant, under a procurement order, was supplying a certain number of machines, and claimant received from the Government oral instructions to supply certain equipment for each machine, and which was not specified in the original order, and in compliance therewith claimants supplied equipment for a portion of the machines which was received and accepted by the Government, and also made expenditures for supplying the remainder of the equipment, there resulted an implied contract by which the Government was obligated to

CONTRACTS—Continued.

pay for the equipment received and accepted and to compensate claimant for losses sustained. (Arthur Vulcanizing Machine Co., Case No. 1705, III these Dec., 624.)

Where the contract for the manufacture of an article provides certain procedure to be followed by the contractor in case of labor disputes likely to cause delay in the performance of the contract, such procedure must be complied with before claimant is entitled to recover additional compensation on account of increased wages. (Wm. L. Barrell Co., Case No. 1202, III these Dec., 967.)

Where the Government orders sample telescopes prior to November 12, 1918, and accepts delivery without having fixed any price, there is an implied agreement such as will entitle the manufacturer to relief under the act of March 2, 1919. (Bausch & Lomb Optical Co., Case No. 1804, III these Dec., 109.)

Where claimant who was patentee and manufacturer of a certain machine designed and used for packing seeds was instructed by authorized officers and agents of the Government to withdraw all of its machines from its licensees, and to collect these and all others and to adapt them for packing soluble coffee, and to place said machines when so adapted with certain concerns, for the purpose of packing coffee, and claimant complied with said instructions and by reason thereof made expenditures and suffered losses, a contract is implied within the provisions of the act of March 2, 1919, by which the Government is obligated to reimburse claimant the expenditures made and to compensate it for losses sustained in executing said instructions. (The Brown Bag Filling Machine Co., Case No. 255, III these Dec., 247.)

Where a prime contractor is delayed in performance of its contract because of slow work and delayed deliveries on the part of a subcontractor, and is therefore instructed by competent authority to cancel its subcontract and make a new one at higher cost with a subcontractor specified by that authority, there is an implied agreement within the terms of the act of March 2, 1919, such as will entitle the prime contractor to reimbursement for such additional cost. (Cleveland City Forge & Iron Co., Case No. 1456, III these Dec., 417, and Case No. 1561, p. 718.)

Where office supplies were orally ordered by a district exemption board and used by the board in the performance of its duties, there was an agreement within the purview of the act of March 2, 1919. (Doubleday-Hunt-Dolan Co., Case No. 2341, III these Dec., 926.)

Where claimant agreed to submit labor disputes to the National War Labor Board and submit to its finding, labor also agreeing to the same, and the National War Labor Board renders a decision granting an increase in wages, and claimant pays the increase according to such decision, there is no agreement on the part of the Government to reimburse claimant for wages so paid. (Eastern Malleable Iron Co., Case No. 2047, III these Dec., 691.)

Where claimant had performed a contract providing for a maximum fee for the manufacture of armor out of material furnished by the Government, and the armor has been manufactured, delivered, and paid for on the basis of the contract, claimant may recover the expenses of buying two barrels of paint and for certain extra labor not contemplated by the parties when the contract was executed in

CONTRACTS—Continued.

preparing raw materials furnished it by the Government, under instructions from an authorized agent of the Government. (Ford Motor Co., Case No. 615, III these Dec., 679.)

Where the Government by changes in the specifications of a formal contract requires greater expenditures on the part of the contractor than those contemplated in the contract and the contractor complies with the change, an implied contract arises under the act of March 2, 1919, by which the Government agrees to reimburse the contractor such expenditures. (Forest City Machine & Forge Co., Case No. 1921, III these Dec., 980.)

Where the claimant while manufacturing a quantity of Mark II adapter and booster casings under a formal contract receives instructions from the Government to make such articles according to a new and changed specification submitted, and claimant complies with the instructions and does the work at an additional expense, there arises, under the act of March 2, 1919, an implied agreement to compensate the claimant for the extra expense thereby incurred. (Forest City Machine & Forge Co., Case No. 1922, III these Dec., 983.)

Where claimant had a formal contract with the Air Service for the sawing of propeller lumber and during the performance of such contract the Government required the contractor to saw the logs so that the parts of the log left would be suitable to make gunstock flitches, and the Government agreed to find the contractor a buyer for the gunstock flitch lumber at \$80 per thousand, and the change required the contractor to use many more logs in performing its formal contract, and the Government failed to procure a purchaser, as it had agreed, there is an implied agreement on the part of the Government to reimburse the contractor the extra expense incurred in complying with the Government's request. (Frelberg Lumber Co., Case No. 561, III these Dec., 227.)

Where claimant had a contract to manufacture spiral puttees like an all-wool sample submitted, and when the Government, through the Quartermaster General, changed the specifications for spiral puttees to be manufactured for Government use, permitting the use of 10 per cent cotton, and such specifications were mailed to claimant and the Government inspector in claimant's plant prior to the completion of the contract, the Government is obligated, under the act of March 2, 1919, to accept and pay the reasonable and fair value of puttees manufactured and delivered by the claimant according to the new specifications. (Hawthorn Mills (Ltd.), Case No. 409, III these Dec., 268.)

Where the Government agreed to supply material of certain dimensions at a fixed price to a manufacturer furnishing articles to it under a unit priced contract, and instead of furnishing material of the dimensions specified furnished material of a different dimension, which resulted in wastage of material and consequent loss to the manufacturer, there is an implied agreement whereby the Government is obligated to pay for the loss. (Hewes & Potter, Case No. 2336, III these Dec., 441.)

When an agent of the Government, in pursuance of his duty and authority, directs the preparation of plans, specifications, and working drawings for the installation of facilities in order that work thereon may be commenced immediately upon execution of a con-

CONTRACTS—Continued.

tract there is an implied contract to pay the necessary and reasonable cost of their preparation. (Lehigh Navigation Electric Co. and Lehigh Valley Transit Co., Cases Nos. 438 and 477, III these Dec., 822.)

Where claimant was informed by authorized officers that it had been recommended for a contract for a definite number of garments, delivery to commence on a definite date, and claimant received materials supplied by the Government for the purpose of the contract which as a matter of fact had, unknown to claimant, been approved by the Board of Awards, there is an implied agreement within the purview of the act of March 2, 1919. (F. W. McLanathan & Son, Case No. 695, III these Dec., 378.)

Where articles are ordered by an authorized representative of the Secretary of War and delivered by a contractor and inspected, passed, and accepted by a Government Inspector at the plant of the contractor, there is an agreement within the purview of the act of March 2, 1919. (Nash Motors Co., Case No. 2264, III these Dec., 780.)

Where an article is ordered by an officer having authority and delivered by a contractor and inspected, passed, and accepted by a Government Inspector at the plant of the contractor, there is an agreement within the purview of the act of March 2, 1919. (Nash Motors Co., Case No. 2265, III these Dec., 811.)

Where trucks were inspected and accepted at claimant's plant by a Government Inspector, if certain parts were missing at destination it was through no fault of the claimant; and where, thereafter, claimant at the request of the Government replaced the missing parts, there was an agreement within the purview of the act of March 2, 1919, under which claimant is entitled to payment for those parts. (Nash Motors Co., Case No. 2342, III these Dec., 857.)

Where claimant, a carpet manufacturer, altered its carpet looms in order to weave duck under Government contracts, no agreement on the part of the Government can be implied from the mere fact of alteration such as will entitle claimant to reimbursement of expense of alteration. (Schofield-Mason & Co., Case No. 2157, III these Dec., 805.)

This is a claim for the value of a rubber belt made and delivered on an oral order from an authorized agent of the Government, under the act of March 2, 1919. Held, that claimant is entitled to recover. (Walter Soderling Co., Case No. 1261, III these Dec., 30.)

Where claimant, under a formal contract, was manufacturing certain machines for the War Department, and the contract provided that the Chief of Ordnance, by written notice, might make changes in the drawings and specifications of said machines, and that if such changes involved additional expense a fair addition might be made to the contract price; and where, in compliance with duly executed instructions, claimant made changes in said machines, and the same caused additional expense, a claim exists for adjustment by the Secretary of War. (William K. Stamets, Case No. 1185, III these Dec., 894.)

Where it was understood between the contractor and the Government that production was to be continuous, and that the Government would take all the goods the contractor could produce, the latter is justified in proceeding without waiting for the formal contract. (The Susquehanna Webbing Co., Case No. 1601, III these Dec., 629.)

CONTRACTS—Continued.

Where claimant made a written contract with the Government to construct an embarkation camp, and it was agreed that claimant would be paid for its services certain allowances and percentages of the cost of the work, the amount in no event to exceed a certain sum, and afterwards the construction officer in charge ordered claimant to make additions to, changes in, and enlargements of the construction which were not within the purview of the original contract, and claimant complied with the order, there resulted an implied contract, within the provisions of the act of March 2, 1919, to compensate claimant for its services in doing said additional work, although such compensation might exceed the maximum amount allowed by the original contract. (J. G. White Engineering Co., Case No. 1895, III these Dec., 289.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; ALLOCATION; AMORTIZATION; COMPENSATION; CONTRACT PRICE; CONTRACTS, ANTICIPATION; CONTRACTS, CONSTRUCTION; CONTRACTS, COST-PLUS; CONTRACTS, ORAL; CONTRACTS, WHAT CONSTITUTES; COSTS, EXPERIMENTAL; COSTS, LEGITIMATE; FACILITIES; REIMBURSEMENT.

CONTRACTS, INFORMAL.

An order orally given by an authorized officer in the Ordnance Department but not subsequently confirmed in writing is not within section 6854 of the Compiled Statutes. (Hawkrigde Bros. Co., Case No. 1960, III these Dec., 471.)

Where claimant entered into an agreement to furnish the Government with 2,732,000 yards of gauze at 10½ cents a yard, and where the formal contract prepared pursuant to such agreement was not signed by claimant because it contained a child-labor clause not acceptable to two of the four mills under claimant's control, but where claimant proceeded to furnish the product of the two of its mills not objecting to the child-labor clause, which was accepted by the Government, there resulted an informal contract to supply the gauze, which was to have been made at those two mills at the price stated. (Watts, Stebbins & Co., Case No. 1729, III these Dec., 772.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; CONTRACTS, CONSTRUCTION; CONTRACTS, IMPLIED; CONTRACTS, INVALID; CONTRACTS, ORAL; CONTRACTS, WHAT CONSTITUTES; JURISDICTION; PURCHASE ORDERS.

CONTRACTS, INTERFERENCE.

Where A cancels his contracts for the purchase of tungsten ore because of priority orders on A issued by the Government, and because of the cancellation of purchase orders from A by C, upon whom the Government had also issued priority orders, the result of which was to leave A overstocked with the class of ore he had agreed to purchase from B, there can be no recovery of damages from the Government by B where there is no evidence of any agreement with the Government on which an obligation to pay the loss suffered by B can be predicated. (H. A. Watson & Co. (Inc.), Case No. 1225, III these Dec., 504.)

Where the United States Government orders a contractor to stop work on a contract for the British Government and takes possession of the articles in process, there arises an implied agreement under the

CONTRACTS—Continued.

act of March 2, 1919, by which the United States is obligated to pay for the articles at a fair valuation. (West & Dodge Co., Case No. 1549, III these Dec., 750.)

Under such circumstances a fair valuation is the cost of the articles in process, plus the percentage of profit claimant would have made on the contract which was interfered with, in this case 25 per cent. (West & Dodge Co., Case No. 1549, III these Dec., 750.)

CONTRACTS, INVALID.

Where, after the contract has been fully performed, a supplemental agreement is executed containing the provision regarding freight charges which had been omitted in the original contract, the supplemental agreement is without consideration and void. (Northwestern Manufacturing Co., Case No. 2256, III these Dec., 681.)

An attempted settlement of an informal contract prior to the passage of the act of March 2, 1919, is invalid because of not being based upon a valid consideration and should be disregarded. (Thos. Roberts & Co. (Factors for W. S. Davidson), Case No. 1606, III these Dec., 731.)

Prior to the passage of the act of March 2, 1919, the Secretary of War had no power to enter into an agreement in settlement of an informally executed contract. Such an agreement executed February 11, 1919, is void, and therefore a release contained therein is of no effect, and claimant is now entitled to be paid certain items which were disallowed through error. (Standard Rolling Mills (Inc.), Case No. 2350, III these Dec., 892.)

Where, after the termination of the original contract for the construction of a camp, claimant and the Government officer made a supplemental contract in order to provide payment to claimant for the rendition of services in addition to those provided for in the original contract, and where said supplemental contract purported to amend the original contract by increasing the maximum total amount which claimant might receive under the original contract, and it was so recited in the supplemental contract, said supplemental contract is void for the reason (1) that the said additional work was not within the purview of the original contract, and (2) because of the recitals to the effect that as to such work the contracting officer had a right to call for the same under the original contract. (J. G. White Engineering Co., Case No. 1895, III these Dec., 239.)

A settlement agreement of an informal contract prior to the act of March 2, 1919, was invalid because not based upon valid consideration. Such an attempted settlement must therefore be disregarded. (Winfield Webster & Co., Case No. 478, III these Dec., 10.)

See also **CONTRACTS, CONSIDERATION**; **CONTRACTS, UNLAWFUL**;
CONTRACTS, WHAT CONSTITUTES.

CONTRACTS, MODIFICATION.

See **CONTRACTS, AMENDMENT.**

CONTRACTS, NONPERFORMANCE.

When a contract has been canceled for an entire failure of performance on the part of the contractor, the Secretary of War has no jurisdiction to make a settlement thereunder. (Phillip Carey Co., Case No. 1491, III these Dec., 1028.)

CONTRACTS—Continued.

Under such circumstances there can be no recovery under the act of March 2, 1919, because it does not appear that claimant's agreement "has been performed in whole or in part." (Phillip Carey Co., Case No. 1491, III these Dec., 1028.)

See also JURISDICTION.

CONTRACTS, ORAL.

Claim under act of March 2, 1919, for \$8,674.27, damages alleged to have been sustained by claimant on the faith of an oral order to manufacture 1,000 tubular radiators for SE-5 airplanes. Held, an informal agreement arose within the purview of the Dent Act, under which claimant is entitled to a fair and equitable adjustment. (Fedders Manufacturing Co. (Inc.), Case No. 1518, III these Dec., 974.)

Claim is made under the act of March 2, 1919, for \$456 for special equipment orally ordered by an authorized agent and delivered to the Government. Held, claimant is entitled to recover, but the exact amount can not be determined from the facts before the board. (John Simmons Co., Case No. 1854, III these Dec., 187.)

Where the Government through an officer of the War Department entered into an oral agreement, under the terms of which claimant was to furnish certain articles to the Government, and claimant delivered such articles and the Government accepted same, the Government is liable for the price agreed to be paid. (Troy Laundry Machinery Co. (Ltd.), Case No. 1264, III these Dec., 100.)

Where an authorized officer gave claimant's representative an oral order for certain repair parts and claimant delivered the parts in compliance with the order, there was an agreement within the terms of the act of March 2, 1919. (Westinghouse Electric & Manufacturing Co., Case No. 2033, III these Dec., 652.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; CONTRACTS, ADJUSTMENT; CONTRACTS, Cost-Plus; EVIDENCE.

CONTRACTS, PERFORMANCE.

Where claimant had a formal contract for the delivery of hay in such quantities and at such times prior to November 16, 1917, as might be required, and the Government called for a large quantity on November 10, 1917, only part of which claimant delivered, such delivery, though made in December, must be construed as made under the contract and at the contract price. Claimant, therefore, is not entitled to be paid the difference between the market price and the contract price, on the theory that the Government in accepting the hay after the expiration of the time limit took it on an implied promise to pay the market value thereof. (Dewey Bros. Co., Case No. 1221, III these Dec., 580.)

Where claimant had a formal contract for the delivery of hay in such quantities and at such times prior to November 24, 1917, as might be required; and the Government called for a large quantity shortly prior to that date, only part of which claimant delivered, such delivery, though made in January, 1918, must be construed as made under the contract and at the contract price. Claimant, therefore, is not entitled to be paid the difference between the market price and the contract price, on the theory that the Government in accepting the hay

CONTRACTS—Continued.

after the expiration of the time limit made an implied promise to pay the market value thereof. (Dewey Bros. Co., Case No. 1223, III these Dec., 583.)

See also CONTRACT PRICE.

CONTRACTS, PREPARATION.

See CONTRACTS, ANTICIPATION.

CONTRACTS, PROMISE.

Where an authorized representative of the Government advises the manufacturer that if it will install certain special machinery for the manufacture of airplane parts it will be kept busy on Government work, such promise must be construed as limited by the requirements of the Government on account of the war, and such obligations of the Government as might arise therefrom were terminated by the armistice. (Direct-O-Light Co., Case No. 1628, III these Dec., 735.)

Where the inventor of a bullet-casting machine makes certain improvements to adapt it to the needs of bullet manufacturers, and the Ordnance Department promises to recommend its adoption if it meets the approval of the bullet manufacturers, and where, owing to the armistice, the experimental installation of the machine never takes place, there is no obligation on the part of the Government to reimburse the inventor for his expenses in making the improvements in his machine. (T. B. Stephenson, Case No. 1498, III these Dec., 363.)

Where a contractor is definitely promised an order for the manufacture of goods and is requested to hold its workmen together in order to execute the order, there is an agreement within the purview of the act of March 2, 1919. (Walter M. Steppacher & Co. (Inc.), Case No. 1773, III these Dec., 225.)

Where, owing to default in deliveries, a contract for goods is cut down, whereupon the contractor asks a representative of the Government to reinstate the quantity so reduced, and the representative states that he can not do so but will probably be able to give him another contract for that quantity on completion of the first contract, such representations do not amount to an agreement within the meaning of the act of March 2, 1919. (Walker Knitting Mills, Case No. 475, III these Dec., 446.)

See also AWARD, RECOMMENDATION; CONTRACTS, RECOMMENDATION.

See JURISDICTION.

CONTRACTS, RECOMMENDATION.

Where claimant submitted a bid to manufacture long wool trousers, and the acting chief of the clothing branch recommended that a contract issue, but it never did issue, and claimant was never officially notified of the recommendation, there is no agreement, express or implied, between the claimant and the Government. (Harper Manufacturing Co., Case No. 2013, III these Dec., 74.)

A statement by a Government officer that it was his intention to recommend a contract does not make a contract. (International Silver Co., Case No. 1199, III these Dec., 729.)

A letter from the chairman of the committee on supplies, Council of National Defense, recommending a certain agreement between claimant and a depot quartermaster, can not be considered as an agreement when on its face it is a mere recommendation. (Schofield-Mason & Co., Case No. 2157, III these Dec., 805.)

CONTRACTS—Continued.

Where a contractor engaged exclusively in Government work is informed by a procurement officer that it had been recommended for another contract, but is advised to do nothing until it should receive the contract, but, relying upon the advice of another officer who, however, had no contracting authority, maintained its organization and equipment in readiness for the expected contract which was never awarded, the contractor is not entitled to reimbursement under the act of March 2, 1919. (Simple Simon Manufacturing Co., Case No. 1254, III these Dec., 105.)

Recommendation of an award is not an agreement within the meaning of the act of March 2, 1919, and where no contract was made or orders given there can be no liability on the United States. (Sper Mel Clothing Corporation, Case No. 1968, III these Dec., 373.)

Where a negotiating officer informs a contractor that he has recommended the awarding of a contract but warns against going ahead before receipt of the contract, there is no agreement within the purview of the act of March 2, 1919. This is true even if there is a representation of the great need for the article which is the subject of the proposed contract. (Twentieth Century Stamping & Tool Works, Case No. 2253, III these Dec., 154.)

A recommendation of an award is not a contract. (Urfit Pants Co., Case No. 2008, III these Dec., 370.)

CONTRACTS, PROXY-SIGNED.

See also AWARD, RECOMMENDATION; CONTRACTS, ANTICIPATION; CONTRACTS, PROMISE; CONTRACTS, WHAT CONSTITUTES.

CONTRACTS, RE-FORMATION.

Where, through a mutual mistake, a proxy-signed contract does not correspond to the real agreement of the parties, it will be re-formed, even though the contract has been fully performed, and compensation has been received by the contractor. (Braddock Manufacturing Co., Case No. 424, III these Dec., 554.)

Since there was mutual mistake in not providing in the second formal contract for the amortization unabsorbed by the first, claimant would now be entitled to reformation of its second contract. The same results, however, may be more easily obtained by means of a further supplemental settlement contract. (Holbrook Co., Case No. 577, III these Dec., 576.)

Where there is no evidence of mutual mistake, a written contract for the manufacture of articles signed by the contractor, though proxy-signed on behalf of the Government, will not be reformed. (Marsh Manufacturing Co., Case No. 2226, III these Dec., 994.)

Where claimant seeks the reformation of a written contract with the Government, upon the ground that during the negotiations the contracting officer made certain statements or representations as to the amount or volume of work which would be given to claimant under the contract, and the contract itself did not provide for any specific amount or volume of work and there was no mistake as to its provisions, claimant is not entitled to the relief of reformation. (National Laundry Co., Case No. 1, Rehearing, III these Dec., 593.)

A mistaken belief entertained by one of the parties to a contract, as to one provision of the same, which was not shared or caused by the other party, particularly if the opposing party did not thereby obtain an unconscionable advantage, can not be made the basis of

CONTRACTS—Continued.

relief. And where the claimant quoted a price of \$7.95 each for making oil drums, including plugs and gaskets, and afterwards changed the offer to \$7.80 each, and thereafter the amended offer was accepted by the Government, and claimant manufactured and delivered the drums and received payment at \$7.80 each, claimant is not entitled to the difference between the two prices, upon the ground as alleged that it had a belief that the price of \$7.80 did not include plugs and gaskets. (Nebraska & Iowa Steel Tank Co., Case No. 1691, III these Dec., 422.)

Where there was a mutual mistake of law in drafting a supplemental contract in settlement of a formal contract, with the result that a proper item of claim was omitted, claimant is entitled to a reformation of the supplemental contract. (Pahl-Hoyt Co., Case No. 2230, III these Dec., 919.)

Where through mutual mistake a written contract failed to include terms which both parties intended it to contain, the Secretary of War has the power to reform the contract, the power to reform an instrument being a part of the original power to execute it. (Siegal & Siegal, Case No. 268, III these Dec., 498.)

Where a formal contract provided for the price and stated that said price was taken from the current catalogue of claimant and, after performance, it was discovered that the prices stated in the contract were less than the prices stated in the current catalogue, and claimant renders voucher according to the price in the catalogue, and is refused payment, and claimant changes the voucher to conform to the contract price and receives payment, claimant is not entitled to a reformation of the contract. (Splittdorf Electrical Co., Case No. 2313, III these Dec., 511.)

Where a contractor seeks reformation of a contract on the ground of mistake, the contractor must show that the mistake was mutual. (Universal Machine Co., Case No. 2040, III these Dec., 753.)

See also JURISDICTION.

CONTRACTS, RESCISSION.

See JURISDICTION.

CONTRACTS, SETTLEMENT.

Where a settlement contract was made between claimant and the Secretary of War, and claimant accepted the award made thereunder, and said award reserved to claimant the right to file suit in a competent court for a disallowed item, claimant has no right to reopen the matter of said item before the Secretary of War. (Alcohol Products Co., Case No. 657, III these Dec., 535.)

Where a written contract has not been terminated by performance or by breach, the Secretary of War has jurisdiction to enter into a supplemental settlement contract adjusting all questions arising under such contract. (Atlas Cabinet Co., Case No. 2374, III these Dec., 647.)

Where the claim is based on the theory that in making settlement agreements upon a number of Government contracts the item claimed was not included in the settlements, and where said settlement agreements each contained a release to the Government of all claims under the original contract, and where permission was given to claimant by this Board to amend its petition within a specified time to set forth and describe said claim and to present evidence in respect to

CONTRACTS—Continued.

the circumstances under which it executed the settlement agreements, and claimant failed or refused to comply with said permission, relief will be denied. (L. H. Gilmer Co., Case No. 1228, III these Dec., 960.)

Where in a settlement contract a release reserved to the claimant the right to file its claim for special facilities under the act of March 2, 1919, such release is not a bar to the settlement of its claim in another form or by another method when it is found that that act does not apply. (Holbrook Co., Case No. 577, III these Dec., 576.)

Where, acting on the suggestion of the officer in charge of construction, claimant operated a commissary as a subcontract and, on disapproval of this course by higher authority, settled the claim of the subcontractor by employing him as manager of a commissary operated directly by claimant, and the Government paid for the redemption of outstanding meal and bunk tickets issued by the subcontractor, the Government has no further liability on account of this commissary contract. In particular it is not liable to claimant for a sum paid by claimant to the subcontractor after completion of the prime contract in settlement of all claims under the subcontract. (Twohy Bros., Case No. 1859, III these Dec., 946.)

See also CONTRACTS, SUSPENSION; JURISDICTION.

CONTRACTS SUBJECT TO APPROVAL.

See CONTRACTS, WHAT CONSTITUTES.

CONTRACTS, SUBSTANTIAL COMPLIANCE WITH TERMS.

See CONTRACTS, CANCELLATION.

CONTRACTS, SUPPLEMENTAL.

Where an oral agreement for the manufacture of propellers at a price sufficient to amortize the required special facilities was merged into two successive formal contracts, if such facilities have not been fully amortized under the first formal contract, then under Supply Circular 111 claimant is entitled on settlement of its second contract to the unabsorbed amortization. Where this has been done in the present supplemental contract, it should be accomplished by means of a further supplemental contract. (Holbrook Co., Case No. 577, III these Dec., 576.)

Where claimant had entered into a formal contract to furnish the United States Government with a quantity of radiators and fan units complete and it was later agreed to amend said contract by supplemental contracts which were agreed upon but never executed by reason of the signing of the armistice, the agreements to have been embodied in the supplemental contracts constituted an informal contract within the meaning of the act of March 2, 1919. (McCord Manufacturing Co. (Inc.), Case No. 1711, III these Dec., 952.)

Where a supplemental agreement is executed partly in order to reduce this implied obligation on the part of the Government to express terms, but through mutual mistake the instrument does not accomplish this purpose, but on the contrary releases the Government from all claims, this Board, although without jurisdiction under the act of March 2, 1919, to consider the claim as an implied agreement, has jurisdiction, under General Order 103 to reform the supplemental agreement by means of another supplemental agreement. (Siegal & Siegal, Case No. 268, III these Dec., 498.)

See also CONTRACTS, CONSTRUCTION; CONTRACTS, INVALID;
CONTRACTS, SUSPENSION; JURISDICTION; RELEASE.

CONTRACTS—Continued.

CONTRACTS, SUSPENSION.

Where claimant had a formal supplemental contract with the Government which suspended the original contract, and which provided that the Government might reinstate the original contract and that, if reinstated, it was to be performed in accordance with the terms of the original contract, and which further provided that in no event should the claimant receive a greater amount than that provided for in the original contract; and where, during the period of suspension, claimant increased the wages of its labor, and the cost of production to claimant was thereby enhanced and makes claim, after full performance, for the amount of such increase of wages, in the absence of fraud, accident, or mistake, none of which is alleged, and there being no provision for the reimbursement of such increase of wages, the claimant is not entitled to the relief sought. (American Blower Co., Case No. 2389, III these Dec., 715.)

Where the Government suspends a contract before completion, an obligation arises under the act of March 2, 1919, to reimburse the contractor the loss sustained in commitments and on material procured to perform such contract. (Hawthorn Mills (Ltd.), Case No. 408, III these Dec., 275.)

Where the Government has a suspended formal contract with a manufacturer, and intends to direct the resumption of manufacture thereunder, but by mistake sends the telegram directing the resumption to claimant, who has no contract, who manufactures the articles and ships them (according to directions addressed to the contractor, but inclosed in an envelope directed to and received by claimant), there is no resumption of the formal contract. (Huttig Sash & Door Co., Case No. 2425, III these Dec., 928.)

When a formal contract is suspended the contractor is entitled to settlement under Supply Circular No. 111 in respect to the uncompleted portion of the contract. (Lambertville Rubber Co., Case No. 1840, III these Dec., 375.)

Where the Government at first chose to suspend the contract, but 5 months later gave the 15 days' notice of cancellation, it can not be permitted to profit by the fact that claimant at the request of the Government had altered its position so that it was no longer able to produce goods in the large quantities which it could have produced at the time it suspended production. The cancellation notice must therefore be considered as issued nunc pro tunc, and, accordingly, the settlement agreement is now to be based upon the amount of goods the claimant would have manufactured during the 15 days following the original date of suspension. (Standard Oil Co. of Indiana, Case No. 371, III these Dec., 743.)

Where the United States Government suspends a contract, thereby causing the prime contractor to repudiate its contract with claimant to purchase 200,000 pounds of yarn, the United States Government is under no obligation, under the act of March 2, 1919, to find another purchaser for claimant for that portion of the yarn not taken by the prime contractor. (Wellington, Sears & Co., As Agents For Hamilton Woolen Co., Case No. 345, III these Dec., 412.)

See also AMORTIZATION, OF FACILITIES; CLAIMS, SUBCONTRACTOR; CONTRACTS, CANCELLATION; CONTRACTS, COST-PLUS; EXPENSES, OVERHEAD; JURISDICTION; PROFITS, PROSPECTIVE.

CONTRACTS—Continued.**CONTRACTS, TERMINATION.**

Where a termination agreement is tentatively agreed to, before the final draft, the contracting officer should submit the question of whether the agreed figures constitute a proper basis of salvage or not to the salvage board of his bureau for its approval. (B. F. Goodrich Rubber Co., Case No. 2444, III these Dec., 474.)

Where claimant's contract was canceled by order of the Secretary of War because claimant and some of his employees had been indicted for alleged fraud in connection with the contract, which cancellation was followed by an order commandeering claimant's existing supplies accumulated under the contract, the contract was terminated even though claimant and his employees were subsequently found "not guilty." (Harry E. Lazarus, Case No. 733, III these Dec., 279.)

Where claimant was holding a certain percentage of its output of certain articles, under request of the United States Food Administration, pending negotiations for the purchase of the same, for the use of the Army, Navy, and Marine Corps, and at the request of claimant said articles were released and claimant was given permission to dispose of the same, the contract, if any was made, was thereby terminated and discharged. (Sweet & Conrad Canning Co., Case No. 1604, III these Dec., 661.)

Where the Government has substantially performed its part of a contract and the time for the performance of the contract has elapsed, the contract is terminated. (United Disposal & Recovery Co., Case No. 2397, III these Dec., 815.)

See also CONTRACTS, CANCELLATION; CONTRACTS, CONSTRUCTION; JURISDICTION; RELEASE.

CONTRACTS, UNLAWFUL.

The act of March 2, 1919, provides relief only in cases where the statutory requirements in connection with the execution of contracts were not met; it does not authorize adjustment of an agreement entered into in direct contravention of a statute. This Board, therefore, can not recommend the payment of a bill for advertising contracted in violation of section 3828, Revised Statutes, which provides that no advertisement shall be published except in pursuance of written authority from the head of an executive department. (The Cincinnati Enquirer, Case No. 2009, III these Dec., 798.)

See also CONTRACTS, INVALID.

CONTRACTS, WHAT CONSTITUTES.

Where claimant furnished airplane parts to an airplane manufacturer, believing and understanding the latter to be an agent of the Government, but there is no evidence in the record establishing such agency, an agreement entered into between claimant and such airplane manufacturer is not an agreement within the meaning of the act of March 2, 1919. (Bishop & Babcock Co., Case No. 1201, III these Dec., 992.)

Where the claimant made a proposal to sell to the United States Government its entire production for the months of November and December, 1918, and January, 1919, consisting of 27 planing machines, or 9 each month, and where the correspondence between the parties tends to show negotiations only, there is no obligation under the act of March 2, 1919, on the part of the United States Government to reimburse claimant for losses sustained by reason of the failure

CONTRACTS—Continued.

on the part of the Government to take and pay for the machines alleged to have been sold. (Biskett Machine & Manufacturing Co., Case No. 505, III these Dec., 53.)

Where claimant made a formal contract with the Government, subject to the approval of the Surgeon General, which was not approved by the Surgeon General, there is no binding contract between claimant and the Government. (F. A. Cigol Rubber Co., Case No. 1670, III these Dec., 335.)

Where claimant had negotiations with the Government for a clothing contract which was prepared in writing and submitted to claimant but was not executed by either party, and claimant is unable to fix dates of interviews or the name of any Government agent taking part in them, there is no agreement within the terms of the act of March 2, 1919. (Conway Clothing Co., Case No. 1706, III these Dec., 506.)

In the absence of an agreement, express or implied, no relief can be awarded under the act of March 2, 1919. (Couch Bros. Mfg. Co., Case No. 619, III these Dec., 560.)

Where a duly authorized agent of the Government promises a manufacturer if it will install certain special machinery for the manufacture of airplane parts that orders for such parts will be given it by the Government, but no definite promise is made as to the number of parts to be contracted for, no price is fixed for the parts, and no agreement is made that future orders will be sufficient to amortize the cost of the machines, such a promise is too vague and indefinite to constitute an agreement under the act of March 2, 1919. (Direct-O-Light Co., Case No. 1628, III these Dec., 735.)

Where claimant was instructed by Government officers to manufacture a certain number of synchronizers, and claimant proceeded to comply with the instructions and in so doing made expenditures, there was a contract under the act of March 2, 1919. (Disco Electrical Manufacturing Co., Case No. 2207, III these Dec., 152.)

Where a manufacturing company was notified by the American Iron & Steel Institute that a quantity of shell steel was allocated to it, contract for which should be negotiated "with Army Ordnance in the usual manner," and claimant did not regard the notification as an order, there was no agreement within the meaning of the act of March 2, 1919. (Domer Steel Co., Cases Nos. 746 and 747, III these Dec., 637.)

Claim under act of March 2, 1919, for damages on account of failure to award contract to claimant. *Held*, no agreement within the meaning of act of March 2, 1919. (Thomas Graham & Co., Case No. 1782, III these Dec., 870.)

Claim for \$1,237.62 on an alleged order for canteens. *Held*, there was no agreement within the meaning of the act of March 2, 1919. (International Silver Co., Case No. 1198, III these Dec., 660.)

Where claimant was notified of an award of a contract, there was an agreement within the terms of the act of March 2, 1919, even though claimant was notified to suspend operations before actually receiving the contract. (B. F. Moore & Co., Case No. 555, III these Dec., 502.)

Where claimant, after submitting a bid, received a telegraphic order for field desks which, on account of the intervention of the armistice, was not followed by a formal contract, there was an agreement within

CONTRACTS—Continued.

the purview of the act of March 2, 1919. (Morgan Lumber & Manufacturing Co., Case No. 2311, III these Dec., 777.)

Where claimant submitted an unsolicited proposal to furnish air compressor outfits, and was told by a Government agent that he would recommend a contract, but that he had no authority to make a contract, and then claimant incurred expenses, and no contract issued, there is no agreement on the part of the Government to reimburse claimant for expenses so incurred. (Novo Engine Co., Case No. 585, III these Dec., 131.)

Where the Government asks for bids on pick mattocks in accordance with blue print B-7, and claimant submitted a bid according to its own blue print No. 25-101, and the Government wrote claimant that recommendation for a contract had been made according to Government blue print B-7, and claimant wrote back that it had changed the specifications to its own blue print No. 25-101, to which letter the Government did not reply, and claimant immediately began to make dies and incurred expense for the performance according to its own blue print, No. 25-101, there is no meeting of the minds constituting an agreement. (Oliver Iron & Steel Co., Case No. 56, III these Dec., 111.)

Where a price for goods is suggested by the Acting Quartermaster General, whose letter is shown to claimant who thereupon agrees to the price, but final arrangements are expressly stated to be subject to the approval of a depot quartermaster, who never approved them nor gave claimant an order, there is no agreement between the parties. (Oxford Manufacturing Co. (Ltd.), Case No. 2190, III these Dec., 533.)

Where claimant wrote the War Department that it would grant the War Department the unlimited use of its patented Parker process for the prevention of rust, without fees, provided the War Department would purchase supplies, etc., at current prices, which letter the War Department did not answer, and the War Department did order some of claimant's products, and claimant, anticipating large orders, made large commitments on which it lost by reason of not getting the large orders, there is no agreement, express or implied, whereby the Government should reimburse claimant for the loss. (Parker Rust-Proof Co., Case No. 1203, III these Dec., 69.)

Where claimant, owning and operating a gas plant at Philadelphia, believed that the prosecution of the war would call for more gas than claimant's company was capable of supplying, and accordingly started to increase its facilities, it having been suggested to claimant by the Chief of the Plant Facilities Section that possibly the War Finance Corporation would assist claimant financially, there is no agreement on the part of the Government to reimburse claimant for expenses so incurred. (Philadelphia Suburban Gas & Electric Co., Case No. 1715, III these Dec., 158.)

Where there was no statement that constituted an agreement on the part of any person acting under the authority of the President or the Secretary of War, and not even any expectation on claimant's part that the Government would be in any way responsible for payment by the manufacturer, claimant is not entitled to relief under the act of March 2, 1919. (Pickands, Brown & Co., Case No. 1646, III these Dec., 843.)

CONTRACTS—Continued.

Where on October 19, 1918, claimant's representative and a Government official entered into an oral contract for the manufacture of 70,000 yards of herringbone tape, deliveries to begin November 16, and a formal written contract was sent claimant, the terms of which conformed to the oral contract, and claimant refused to sign same, there is no binding contract subsequent to such refusal. (Sanford Narrow Fabric Co., Case No. 1934, III these Dec., 522.)

Where claimant proceeded to equip its factory to manufacture 1,000 rockets a day at the request of a contracting officer, on the understanding that it would receive a contract which would amortize its expenses thus incurred, there was an express agreement within the terms of the act of March 2, 1919. (Schenectady Fireworks Co., Case No. 2058, III these Dec., 547.)

Where the contracting officer entered into a written contract, "subject to the approval of the Surgeon General," and the Surgeon General did not approve same, the contract is informal and invalid. (Scientific Utilities Co. (Inc.), Case No. 1967, III these Dec., 39.)

Where claimant furnished the Government unwelded wire for the construction of a fence, and same was refused because the purchase order therefor specified welded wire, the Government is under no obligation, under the act of March 2, 1919, to reimburse the claimant its loss thereby sustained. (Shoedinger-Marr Co., Case No. 1639, III these Dec., 573.)

Notification of an award of a contract constitutes an agreement under which claimant may be entitled to relief under the act of March 2, 1919. (Henry Sonneborn & Co. (Inc.), Case No. 333, III these Dec., 676.)

An expression of opinion that claimant would probably be promoted does not amount to an agreement to pay claimant an increased salary under the act of March 2, 1919. (Paul J. Summers, Case No. 2245, III these Dec., 73.)

Where both parties considered that their minds had met in an agreement which was clear and definite as to its terms, and acted prior to November 12, 1918, on the basis of that agreement, there was an agreement within the provisions of the act of March 2, 1919, even though the written acceptance of the terms of the contract was dated November 12, 1918. (The Susquehanna Webbing Co., Case No. 1601, III these Dec., 629.)

Where claimant, a lawyer, was contemplating a trip to Mexico City, and secured from the Chemical Warfare Service the prices they would pay for palm nuts, and made the trip, but bought no nuts, nor tendered any to the Government, there is no agreement on the part of the Government to pay claimant's expenses. (John M. Sutton, Case No. 1192, III these Dec., 459.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; ALLOCATION; CONTRACTS, ANTICIPATION; CONTRACTS, IMPLIED; CONTRACTS, RECOMMENDATION.

CONTRACTS, WRITTEN.

Where claimant and its subcontractor had negotiations with Government officers, which terminated in the making of a formal contract between claimant and the subcontractor, for the manufacture of a certain number of articles by the subcontractor for the War Department, and during said negotiations statement was made by an

CONTRACTS—Continued.

officer of the Navy Department that he felt sure that claimant would get additional orders for making a larger quantity of said articles, the negotiations were merged in the written contract, and no implied contract was made to manufacture a larger number of the articles, and in making expenditures in expectation of getting such larger orders claimant assumed an ordinary business risk. (American Can Co., Case No. 2216, III these Dec., 351.)

Where parties enter into a written contract, if the contract purports to embody therein all of the subject matter of the negotiations, all previous negotiations are merged in the contract and the writing is held to be the final understanding of the parties; and where claimant entered into a written contract with the Government to store in claimant's warehouse certain quantities of meat, at prices fixed by the contract, the Government is not liable to pay claimant for expenditures made by it in increasing its facilities sufficiently to perform the contract, nor to pay for storage space which was vacant while claimant was making changes in its warehouse, the contract not providing for such payment. (Chicago Cold Storage Warehouse Co., Case No. 2231, III these Dec., 20.)

Where it is clear from the Government letter of acceptance that only a qualified acceptance of the contractor's proposal is intended, and afterwards a written contract is entered into, in which the proposal is not embodied, such proposal can not be considered a part of the contract. (Marsh Manufacturing Co., Case No. 2226, III these Dec., 994.)

Where parties conduct negotiations, which are afterwards embodied in a written contract, the negotiations with reference to the subject matter and the agreements are merged in the contract; and where the claimant made a written contract with the Government which bound claimant to do a certain kind of work at certain prices, the volume or amount of which was not specified in the contract, the claimant will not be permitted to vary or alter the terms of the contract by showing that during the negotiations the officers representing the Government made certain statements or estimates as to amount of work the claimant would be given in performing the contract. (National Laundry Co., Case No. 1, Rehearing, III these Dec., 593.)

Where claimant, in making bids, stated in its bid that if freight rates should be advanced at time of shipment, additional freight charges would be added to its prices, but the written contract contained no such provision, and claimant went ahead, performed the contract, and received payment at the price fixed therein without protest, it is not entitled to be paid the amount of the additional freight charges. (Northwestern Manufacturing Co. Case No. 2256, III these Dec., 681.)

Claimant can not recover by reason of any statements made by the contracting officer at the time of negotiations to the effect that the Government would accept 10 per cent overage, for the reason that such negotiations merged into the written contract. (Alexander Propper & Co., Case No. 534, III these Dec., 300.)

Nor in such a case can claimant recover on the theory that at the time it made settlement of its written contract and executed a full release claimant was informed that it was not thereby waiving its right to

CONTRACTS—Continued.

claim overage, it being clearly established that the officers of the Government negotiating the settlement did not so inform claimant. (Alexander Propper Co., Case No. 534, III these Dec., 300.)

Where the officer who negotiated a formally executed contract agreed that a contractor might use 500-pound cases but the contract thereafter executed stipulated 300-pound cases, and the Government inspector refused to accept the larger cases, claimant is not entitled to relief under the alleged oral agreement, because such oral agreement was merged in the written contract. (Sewell-Clapp-Envelopes, Case No. 633, III these Dec., 32.)

All negotiations and oral understandings are merged in a written agreement covering the same subject matter. (Henry Sonneborn & Co. (Inc.), Case No. 333, III these Dec., 676.)

See also **CONTRACTS, FORMAL; CONTRACTS, INVALID; CONTRACTS, REFORMATION.**

CONTROLLED INDUSTRY.

Where the United States Food Administration issued a bulletin and mailed same to claimant requiring 45 per cent of its pack of 1918 canned tomatoes for Army, Navy, and Marine Corps purposes, and guaranteed claimant to take such per cent of such pack, and where such action on the part of the Food Administration was adopted by the War Department as its own, there arose, under the act of March 2, 1919, an obligation on the part of the United States Government to reimburse claimant its loss sustained in complying with the order given. (Thomas Roberts & Co. (Factors for W. S. Davidson), Case No. 1606, III these Dec., 731.)

Where claimant entered into a contract to furnish a quantity of cloth to a contractor doing Government work, and where the yarn from which such cloth was manufactured was allotted to the claimant by the Government with an agreement limiting its use for that purpose, and where claimant had on hand an excess amount of cloth and yarn and asked permission of the Government to dispose of same to civilian trade, and where the Government refused such permission, there arose an obligation under the act of March 2, 1919, to reimburse claimant such loss as it suffered by reason of its compliance with the orders of the officers of the United States Government. (Specialty Knit Goods Mfg. Co., Case No. 341, III these Dec., 905.)

In such a case, especially is claimant entitled to recover in view of the fact that the War Industries Board had virtually assumed control of claimant's material and he could not dispose of it. (S. Stroock & Co., Case No. 90, III these Dec., 359.)

Where claimant was ordered by the War Industries Board and by the Quartermaster General not to dispose of a certain article, which claimant owned, for the reason that the Government intended to commandeer the same, and claimant complied with said order, there resulted an implied contract within the act of March 2, 1919, by which the Government was bound to compensate claimant for losses sustained by obeying said order. (Frank L. Young Co., Case No. 178, III these Dec., 495.)

See also **REIMBURSEMENT.**

CONVERSION BY GOVERNMENT AGENT.

See **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

COST OF DEFENDING LAWSUIT.

See **CONTRACTS, CONSTRUCTION.**

COST-PLUS CONTRACT.

See **CONTRACTS, COST-PLUS.**

COSTS.**COSTS, EXPERIMENTAL.**

Where claimant had perfected a lateral stabilizing device for airplanes, and at the request of duly authorized representatives of the Government made further experiments and incurred additional expense in developing a device which was satisfactory for both lateral and longitudinal movements, claimant may recover such expenses as were reasonably necessary to be incurred in perfecting such stabilizer as are directly applicable to the order upon which the claim is based, but can not recover for expenses incurred in order to produce the device first offered to the Government, nor expenses incident to obtaining foreign patents. (Macy Engineering Co., Case No. 32, III these Dec., 390.)

Where claimant has a formal order for masks, and during the life of it changes were made, at the instance of an authorized agent of the Government, which changes required further experimental work and traveling expenses, there is an implied agreement on the part of the Government to reimburse claimant therefor. (Walter Soderling (Inc.), Case No. 2257, III these Dec., 206.)

Where it is shown that it was the intention of those representing the Government during the negotiations to reimburse claimant for costs of experimentation and to pay for technical information, at the time of the delivery to the Government of the first substantial order, in connection with the development of an instrument known as a microphone, to be used in trench warfare, and such substantial order was never given, an obligation is entailed on the part of the Government to reimburse claimant such costs of experimentation and the value of such technical information under the act of March 2, 1919. (Western Electric Co., Case No. 489, III these Dec., 61.)

See also **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

COSTS, LEGITIMATE.

Where civilians employed in the Chemical Warfare Service, while engaged in research work for the Government in claimant's laboratories, used claimant's telephone in connection with official business, an implied agreement arose under which the Government is obligated to reimburse claimant for the cost of such telephone calls. (Columbia University, Case No. 2314, III these Dec., 365.)

Where a cost-plus percentage contract for the construction of a cantonment provides that the contractor shall be reimbursed its actual net expenditures in the performance of the contract as may be approved or ratified by the contracting officer, the cost of an automobile procured at the direction of the constructing quartermaster, who had control and supervision of the construction, comes fairly within the contract terms providing for the reimbursement of the contractor for "facilities necessary for the construction of the camp," where it appears that the automobile was necessary for the use of the Government inspector employed on the work. (Fred T. Ley & Co. (Inc.), Case No. 756, III these Dec., 978.)

COSTS—Continued.

Where a cost-plus percentage contract for the construction of a cantonment provides that the contractor shall be reimbursed for its actual net expenditure in the performance of the contract as may be approved or ratified by the contracting officer, in the construction of buildings (including a hospital) and that it be reimbursed for the cost of maintaining and operating a hospital, expenses incurred by the contractor in maintaining sick and injured employees in a hospital, operated by others, by the direction of the duly appointed representative of the contracting officer, are proper items of expense which the contractor should be reimbursed. (Fred T. Ley & Co. (Inc.), Case No. 759, III these Dec., 902.)

Where a cost-plus percentage contract for the construction of a cantonment provides that items of expense approved by the contracting officer, incident to the maintenance and operation of a commissary, are proper items of cost, necessary traveling expenses, telephone charges, and other items of expense of contractor's agents in getting together equipment, waiters, etc., for the commissary, are within the terms of such contract provisions. (Fred T. Ley & Co. (Inc.), Case No. 763, III these Dec., 840.)

Where fixtures are repaired by a contractor on an order that does not specify the amount to be paid, the Government, having received the benefit of the repairs, is obligated to pay the contractor a reasonable price for labor and materials expended in making the repairs. (Russell Electric Co., Case No. 2235, III these Dec., 35.)

Where such salaries were expressly included in the contract as items in the cost of the work and toward the end of operations the superintendent and the office manager were relieved and their assistants promoted and charged with the duties of those offices as well as their former duties, the claimant is entitled to reimbursement of the difference between the salaries of the higher and the salaries of the lower positions, since the assistants after their promotion actually received the salaries of the higher positions. (Twohy Bros., Case No. 1859, III these Dec., 946.)

See also CONTRACTS, IMPLIED.

COUNCIL OF NATIONAL DEFENSE, RECOMMENDATION.

See CONTRACTS, RECOMMENDATION.

D.**DAMAGES.****DAMAGES FOR DELAYS IN PAYMENT.**

Where claimant continued to enter into contracts with the Government and accepted purchase orders for articles produced by it, notwithstanding the fact that the Government was slow in making payment on previous deliveries, such conduct on claimant's part estops it from claiming damages on account of delays in payment. (E. C. Gatlin Importing Co., Case No. 661, III these Dec., 757.)

See also INTEREST, IN ABSENCE OF STIPULATION; JURISDICTION.

DAMAGES, UNLIQUIDATED.

See JURISDICTION.

DATE OF FILING CLAIM.

See CLAIMS, FILING.

DECISIONS.**DECISIONS, AFFIRMED.**

This case was remanded by the Secretary of War for further explicit finding of fact and decision as to the liability of claimant to the Central of Georgia Railroad as supplemental to a decision rendered by this Board in this case on August 18, 1919. This supplemental opinion merely makes more explicit one of the original findings of fact regarding location of trackage and confirms the original decision in every respect. I these Dec., 558. (Chamber of Commerce of Montgomery, Ala., Case No. 1661, III these Dec., 5.)

This claim was originally presented under General Order 103 as based upon a duly executed contract and was allowed by this Board on that basis. At the request of the Director of Purchase the matter has been reconsidered and relief granted under the act of March 2, 1919, as under an informally executed contract. On the merits, the former decision (I these Dec., 322) is affirmed, including the amount to be paid claimant. (Stanley Insulating Co., Case No. 180, III these Dec., 1080.)

DEFAULT, CANCELLATION FOR.

See CONTRACTS, CANCELLATION.

DELAYS.**DELAY IN DELIVERY.**

See INTEREST, ON CLAIMS AGAINST THE GOVERNMENT.

DELAY IN PAYMENT.

See DAMAGES.

DELIVERIES.**DELIVERIES, EXPEDITING.**

See LIABILITY OF PARTIES.

DELIVERIES, LATE.

See ACCEPTANCE.

DELIVERIES, SUSPENDED.

See LIABILITY OF PARTIES.

DEMURRAGE.

See QUASI-CONTRACTS.

DEPOSIT IN U. S. MAILS.

See CLAIMS, FILING.

DEPRECIATION OF PLANT EQUIPMENT.

See AMORTIZATION.

DESTRUCTION BY FIRE.

See LIABILITY OF PARTIES.

DIRECTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

DISCHARGE BY MUTUAL AGREEMENT.

See CONTRACTS, TERMINATION.

DISCOUNTS.

Where such goods or any part of them were delivered to and accepted by the Government, payments for the same by the Government were not subject to discount for cash where it was not expressly provided for in the contract. (Fuller Canneries Co., Case No. 1200, III these Dec., 835.)

DISPUTE UNDER CONTRACT EXECUTED IN MANNER PRESCRIBED BY LAW.*See* **CONTRACTS, FORMAL.****DISTINCT CLAIM UNDER GUISE OF AMENDMENT.***See* **CLAIMS, AMENDMENT.****DIVERSION.****DIVERSION BY FUEL ADMINISTRATOR.***See* **LIABILITY OF PARTIES.****DIVERSION OF COAL.***See* **AGENTS, AUTHORITY TO BIND GOVERNMENT.****DIVERSION OF SHIPMENT UNDER FORMAL CONTRACT.***See* **CONTRACT PRICE.****DOCUMENTS INCORPORATED IN CONTRACT BY REFERENCE.***See* **CONTRACTS, CONSTRUCTION.****DURESS.***See* **CONTRACT PRICE.****E.****ENGINEERING AND DEVELOPMENT EXPENSES.***See* **COSTS, EXPERIMENTAL.****EQUIPMENT, RENTED, RESPONSIBILITY FOR.***See* **LIABILITY OF PARTIES.****ERRORS OF CLAIMANT'S EMPLOYEES.***See* **CONTRACTS, CONSTRUCTION.****ESTOPPEL IN PAIS.***See* **DAMAGES.****EVIDENCE.**

Where only two witnesses testified to the transaction, and their testimony was in direct conflict, surrounding facts and circumstances will be examined for the purpose of determining which witness is corroborated. (*Crane & MacMahon (Inc.)*, Case No. 480, III these Dec., 160.)

Where witnesses testified in detail at the trial, their testimony will not be considered as contradicted by affidavits filed with the Board of others who did not appear for cross-examination. (*Maddox Table Co.*, Case No. 1915, III these Dec., 508.)

Where the Government notified claimant, who was then performing Government contracts for the manufacture of woolen trousers, that thereafter contracts would be issued only after the submission of bids, and claimant's representative talked with Lieut. Mann, of the Quartermaster Corps, protesting against being required to submit bids, and claimed that Lieut. Mann told him that his factory would be kept busy, this being denied by Lieut. Mann, there is no agreement on the part of the Government to reimburse claimant for commitments made. (*Modern Pants Co.*, Case No. 2204, III these Dec., 203.)

Where claimant's loader makes affidavit that a carload of hay contained a certain number of bales of a certain weight, and the Government's agent makes affidavit that he unloaded the hay and found that the car contained a certain smaller number of bales of less total weight, claimant has not proved his claim for payment for the difference in weight. (*Elmer G. Porter*, Case No. 2325, III these Dec., 528.)

EVIDENCE—Continued.

Where claimant's witness testified that the Government officer gave him an oral order for 100,000 boxes, and the Government officer positively denied it, there is doubt as to whether or not there was an agreement. (St. Louis Wood Products Co., Case No. 1677, III these Dec., 200.)

Where claimant's witness testifies that a quartermaster officer made a certain oral agreement which that officer denies having made, and his denial is supported by circumstantial evidence, claimant has failed to establish the fact of an agreement. (Henry Sonneborn & Co., Cases Nos. 332, 334, and 385, III these Dec., 776.)

Where the evidence offered in support of a claim is insufficient to show a contract, express or implied, the claimant is not entitled to relief by reason thereof under the act of March 2, 1919. (Southard Contracting Co., Case No. 2252, III these Dec., 868.)

See also CONTRACTS, ANTICIPATION; CONTRACTS, FORMAL.

EXCESS MATERIAL.

See BUSINESS RISK.

EXONERATION.

See SURETY.

EXPEDITING DELIVERIES.

See LIABILITY OF PARTIES.

EXPENDITURES.**EXPENDITURES IN ANTICIPATION OF CONTRACT.**

See CONTRACTS, ANTICIPATION.

EXPENDITURES ON FAITH OF CONTRACT.

See CONTRACTS, ANTICIPATION.

EXPENSES.**EXPENSES AFTER NOVEMBER 12, 1918.**

See JURISDICTION.

EXPENSES, EXPERIMENTAL.

See COSTS, EXPERIMENTAL.

EXPENSES, EXTRA.

Where a formal order had been given for airplane propellers, and later a request for the shipment of five propellers for a special purpose is made, claimant is entitled to no adjustment, even if it was justified in treating the request to ship as an additional order, if in fact it incurred no expense on account thereof and no propellers were made, or expense incident to the making of propellers incurred, after the receipt of the letter requesting that five propellers be shipped. (Maddox Table Co., Case No. 1915, III these Dec., 508.)

Where under a partially completed clothing contract the Government furnished claimant a wrong set of patterns and then ordered claimant to work over the garments so as to make them right, thereby causing claimant extra work, there is an implied promise to pay the reasonable expense of the extra work. (Slegal & Slegal, Case No. 268, III these Dec., 498.)

See also CONTRACTS, IMPLIED.

EXPENSES IN ANTICIPATION OF CONTRACT.

See CONTRACTS, ANTICIPATION.

EXPENSES, MOVING.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

EXPENSES—Continued.**EXPENSES, OVERHEAD.**

Where claimant had a contract to supply 400,000 yards of shock-absorber cord for \$199,360 and such contract was suspended by the Government before completion, and where claimant was a selling and engineering concern and incurred practically all of its expenses before the termination of the contract, claimant is entitled, in addition to its commitments, to reimbursement of its expenditures up to but not exceeding the net amount it would have received if the contract had been completed. (The Ohio Rubber Co., Case No. 1906, III these Dec., 233.) •

Where claimant had a contract to furnish the Government 200,000 feet of shock-absorber cord for \$33,333.33, and such contract was suspended by the Government before completion, and where claimant had incurred practically all of its expenses before the termination of the contract, claimant is entitled in addition to its commitments reimbursement of its expenditures up to but not exceeding the net amount it would have received if the contract had been completed. (The Ohio Rubber Co., Case No. 1917, III these Dec., 317.)

Where the War Department Claims Board provides by resolution that the claimant company shall be entitled to recover overhead expenses "for the certain and definite period covered by the termination clauses in their agreements, and during which, in accordance with the agreements, they would have been permitted to continue production," the resolution is within the powers conferred upon the War Department Claims Board by War Department G. O. No. 40 of 1919 and War Department Circular 28 of 1919, and claimant is entitled to overhead in accordance with the resolution. (The Western Electric Co., Case No. 2189, III these Dec., 140.)

See also JURISDICTION.

EXPENSES, OVERTIME.

Where claimant employed labor overtime in performing a formal Government contract, such overtime being authorized by the contract, and the contract provides for extra pay in case of overtime, and it appears that the necessity for employing overtime labor was not due to any neglect on the part of the contractor, claimant will be entitled to be reimbursed for the amount so expended. (Globe Automatic Sprinkler Co., Case No. 2271, III these Dec., 216.)

EXPENSES, REIMBURSEMENT.

Where a manufacturer operating under a Government contract incurs expenses in erecting a new factory building and installing new machinery therein there is no obligation on the Government to reimburse claimant therefor in the absence of an agreement to that effect. (Marsh Manufacturing Co., Case No. 2226, III these Dec., 994.)

See also REIMBURSEMENT.

EXPENSES, RESELLING.

See COSTS, RESELLING.

EXPENSES, TRAVELING.

See COSTS, LEGITIMATE.

EXPERIMENTAL COSTS.

See COSTS, EXPERIMENTAL.

EXPRESSION OF OPINION.

See CONTRACTS, WHAT CONSTITUTES.

EXTRA EXPENSE.*See* EXPENSES, EXTRA.**EXTRA MATERIAL.****EXTRA MATERIAL AS RESULT OF GOVERNMENT REQUIREMENTS.***See* CONTRACTS, IMPLIED.**F.****FACILITIES.**

Where claimant had a contract to examine, measure, and shrink an indefinite quantity of cloth for the Government, and where claimant was, in connection therewith, instructed to increase its facilities and to develop a greater capacity for the handling of all Government-owned material to be used in the manufacture of Army clothing under existing contracts, there arose an implied obligation on the part of the United States Government, under the act of March 2, 1919, to save claimant harmless on this loss sustained by reason of the installation of such facilities. (Sigmund Eisner Co., Red Bank, N. J., Case No. 2139, III these Dec., 367.)

Where at the time of making such contracts the parties did not contemplate that additional facilities would be required for the performance thereof and no conversation was had or agreement made with reference thereto, the Government is under no obligation, under the act of March 2, 1919, to reimburse claimant the expenditures made in connection therewith. (Hawthorn Mills (Ltd.), Case No. 408, III these Dec., 275.)

See also CLAIMS, SUBCONTRACTORS; CONTRACTS, ANTICIPATION; CONTRACTS, IMPLIED; CONTRACTS, WHAT CONSTITUTES; CONTRACTS, WRITTEN; JURISDICTION; RELEASE.

FACILITIES, AGREEMENT TO PAY AMORTIZATION ON.*See* AMORTIZATION.**FACILITIES, AMORTIZATION.***See* AMORTIZATION.**FACILITIES INCREASED.**

Where the production Division, acting for itself, as well as for the Procurement Division, induces a pistol manufacturer to increase its facilities preparatory to taking on large contracts for the manufacture of pistols, and the manufacturer complies with said request, and the orders are not placed by reason of the armistice, there is an agreement on the part of the Government within the purview of the act of March 2, 1919. (Manning, Maxwell & Moore (Inc.), Case No. 1522, III these Dec., 345, and Pratt & Whitney Co., Case No. 594, III these Dec., 450.)

Where authorized representatives of the Procurement and Production Divisions jointly consider and decide that a manufacturer shall forthwith increase its facilities for machining shells, and it is instructed so to do by an authorized agent of the Production Division and assured that it will receive large contracts, and it does so increase its facilities and does not receive the contracts owing to the termination of the war, there is an agreement within the purview of the act of March 2, 1919, between claimant and an authorized agent of the Government whereby claimant is entitled to be reimbursed expenditures so made. (Spang & Co., Case No. 1526, III these Dec., 178.)

FACILITIES, SPECIAL.*See* CONTRACTS, CONSTRUCTION.

FACILITIES—Continued.**FACILITIES, UNAMORTIZED.***See* AMORTIZATION.**FAILURE TO AWARD CONTRACT, DAMAGES.***See* DAMAGES.**FAIR VALUATION.***See* QUANTUM MERUIT.**FEDERAL TRADE COMMISSION, PRICE REVISION.***See* PRESIDENT, POWERS.**FIRE DESTRUCTION.***See* LIABILITY OF PARTIES.**FOOD ADMINISTRATION.****FOOD ADMINISTRATION BULLETIN.***See* INTEREST, ON CLAIMS AGAINST GOVERNMENT.**FOOD ADMINISTRATION REQUISITION.***See* AGENTS, AUTHORITY TO BIND GOVERNMENT.**FORMAL CONTRACT.***See* CONTRACTS, FORMAL.**G.****GENERAL ORDER 103.***See* CONTRACTS, FORMAL.**GOVERNMENT.****GOVERNMENT CONTRACT WITH SUBCONTRACTOR.***See* CLAIMS, SUBCONTRACTORS.**GOVERNMENT INTERFERENCE WITH CONTRACT.***See* CONTRACTS, INTERFERENCE.**GOVERNMENT NEEDS, REPRESENTATION.***See* CONTRACTS, IMPLIED.**I.****IMPLIED CONTRACT.***See* CONTRACTS, IMPLIED.**INCORPORATION OF DOCUMENTS IN CONTRACTS BY REFERENCE.***See* CONTRACTS, CONSTRUCTION.**INCREASED COST OF PRODUCTION.***See* CONTRACTS, SUSPENSION.**INCREASED FACILITIES.***See* FACILITIES, INCREASED.**INCREASED WAGES PAID BY SUBCONTRACTOR.***See* CLAIMS, SUBCONTRACTORS.**INFORMAL AGREEMENT TO TAKE ENTIRE OUTPUT.***See* AGENTS, AUTHORITY TO BIND GOVERNMENT.**INFORMAL CONTRACT.***See* CONTRACTS, INFORMAL.**INFORMAL ORDER.***See* CONTRACTS, INFORMAL.**INFORMAL PRESENTATION OF CLAIM.***See* CLAIMS, FILING.**INITIAL UNABSORBED OVERHEAD EXPENSES.***See* EXPENSES, OVERHEAD.

INSPECTION, MISSING PARTS.

See **CONTRACTS, IMPLIED.**

INSTRUCTIONS.

INSTRUCTIONS TO MAKE NEW SUBCONTRACT.

See **CONTRACTS, IMPLIED.**

INSTRUCTIONS TO PROCEED WITHOUT WAITING FOR FORMAL CONTRACT.

See **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

INSURANCE.

INSURANCE, PUBLIC LIABILITY.

If after a contractor has taken out public liability insurance, with the approval and under direction of the contracting quartermaster, and before the formal contract is executed, it receives a letter from the officer in charge of cantonment construction notifying it that the Government would carry its own public liability risk, and the formal contract provides that such insurance as the contracting officer may require or approve shall be included as part of the cost of construction, and the contracting officer does not approve or require such insurance, the contractor, if the insurance is subject to cancellation, is only entitled to reimbursement of the cost thereof from the date of the policies up to and including the date of the letter, including the expense of canceling the policies at short rates. (Fred T. Ley & Co. (Inc.), Case No. 741, III these Dec., 880.)

See also **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

INTENTION OF PARTIES.

The provisions of a contract will be construed in the light of the purpose for which they were inserted, and a literal construction which defeats the intention of the parties, as evidenced by said provisions, will not be upheld. (Heine Chimney Co., Case No. 2160, III these Dec., 900.)

INTEREST.

INTEREST IN ABSENCE OF STIPULATION.

Where deliveries of oats formerly contracted for are suspended for six weeks, there being no agreement that the Government should pay interest during the time of such suspension, there is no liability on the part of the Government to pay interest. (Bluff City Grain Co., Case No. 2349, III these Dec., 102.)

Where the Government delays payment for goods delivered to it under purchase orders for a period not anticipated by the contractor, the Government is not liable for damages or interest on account of such delay. (E. C. Gatlin Importing Co., Case No. 661, III these Dec., 757.)

Interest on the amount of a claim against the Government can not be allowed in the absence of special agreement or express statute. (Pressed Steel Car Co., Case No. 2017, III these Dec., 384.)

Under section 1901, Revised Statutes, no interest is payable on any claim against the United States "up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." (West La Fayette Manufacturing Co., Case No. 554, III these Dec., 886.)

INTEREST ON CLAIMS AGAINST GOVERNMENT.

Where by action of the Food Administration, ratified and adopted by the Secretary of War, 15 per cent of claimant's 1918 pack of canned goods was taken for the use of the Army and it was provided that from a fixed date interest at 6 per cent should be allowed, claimant is

INTEREST—Continued.

entitled to such interest. (Fuller Canneries Co., Case No. 1479, III these Dec., 809.)

Where bulletins issued by the United States Food Administration provide for the payment of insurance and storage from December 1, 1918, on goods not ordered supplied prior to that date, with interest from December 1, 1918, on payments made therefor after that date, and such bulletins were adopted by the War Department, purchase orders thereafter issued by the War Department for allotments made by the United States Food Administration are subject to the provisions of such bulletins. (Fuller Canneries Co., Case No. 1200, III these Dec., 835.)

Where the purchase order requires that "All goods must be satisfactory to the purchasing quartermaster" and by reason of claimant's refusal to accept the quartermaster's grading shipments are delayed, interest will be allowed only from the date when it accepted the quartermaster's grading (in this case Jan. 4, 1919), and storage and insurance will be allowed only from the date when the claimant notified the Government that the goods were ready for shipment (in this case Jan. 27, 1919). (Fuller Canneries Co., Case No. 1200, III these Dec., 835.)

Where, under a formal contract for certain articles, it was provided that the Government was to pay for increased facilities, and the Government agreed in writing to pay interest on money advanced by the contractor for these facilities for periods beyond the time specified under the formal contract, the contractor is entitled to interest even though the formal contract contained no provision regarding interest. (Singer Manufacturing Co., Case No. 1803, III these Dec., 833.)

A resolution of the War Department Claims Board of February 19, 1919, authorizes the allowance of interest on capital "tied up" in articles of process and from the time of suspension to date of settlement. (The Western Electric Co., Case No. 2190, III these Dec., 145.)

See also CONTRACTS, CONSTRUCTION; WAIVER.

INTERFERENCE WITH ANOTHER'S CONTRACTS.

See CONTRACTS, INTERFERENCE.

J.**JURISDICTION.**

Where a contract was amended by settlement contract and an award was made thereunder, and claimant accepted the award, the power of the Secretary of War to further amend the contract ceased. (Alcohol Products Co., Case No. 657, III these Dec., 535.)

Where but one question is raised by an appeal, this board is not authorized to consider alternative relief, suggested by claimant for the first time before this board, but the denial of such alternative relief will not preclude it from presenting such claim to the proper claims board. (Anniston Steel Co., Case No. 2248, III these Dec., 862.)

Where claimant voluntarily entered into an agreement with the Government to move its plant from one building to another because the Government desired the use of the former for another Government contractor, and claimant's building along with other buildings were afterwards commandeered by the Government, the jurisdiction of this Board, under the act of March 2, 1919, is not ousted by the

JURISDICTION—Continued.

jurisdiction of the Board of Appraisers under the commandeering order. The fact that claimant has presented claims to both boards makes no difference, since the awards may be coordinated to prevent duplication of payment of any item. (Bijur Motor Appliance Co., Cases Nos. 1215, 1622, 1623, and 1624 combined under No. 1215, III these Dec., 850.)

The Secretary of War has no jurisdiction to adjust a claim upon a validly executed contract, for unliquidated damages arising from delay in performance caused by the Government, where the contract has been performed and claimant has been paid the amount provided in the contract. (The Bloch Co., Case No. 2297, III these Dec., 748.)

Where a procurement information card, which in Ordnance Department practice precedes the procurement order, but no procurement order, was issued, and articles are manufactured and delivered to the Government, and accepted by it, the Ordnance Department has no authority to issue a Form C certificate, as claim is Class B. (The Detroit Chemical Works, Case No. 1643, III these Dec., 874.)

Where the Government notifies claimant that its formal contract is canceled, and the contract contains no cancellation clause, and claimant does not accept cancellation, but insists repeatedly that the contract should not be canceled, the contract is still in existence to the extent that the Secretary of War still has jurisdiction to enter into a settlement contract. (The Engel Aircraft Co., Case No. 2360, III these Dec., 283.)

Since the power of the Secretary of War to settle a formal contract by supplemental agreement depends upon the existence of the contract, the completion of the contract renders such settlement impossible. (Engle & Hevenor, Case No. 1564, III these Dec., 774.)

Claimant is not entitled to an adjustment for additional overhead resulting from the failure of the Government to furnish material within a reasonable time, as such an item would be in the nature of unliquidated damages growing out of the breach of the contract. Since the contract was fully performed, and payment for the armor made and accepted, the contract will be considered closed and can not be revived by the Secretary of War for the purpose of allowing additional overhead charges. (Ford Motor Co., Case No. 615, III these Dec., 679.)

Unless a final award by a bureau board to a contractor is made, an additional claim based on a claim of a subcontractor, which was overlooked in presenting previous claims, may be considered by a bureau board. (Ford Motor Co. and Taft-Pierce Manufacturing Co., Case No. 2300, III these Dec., 542.)

Although an appeal from a claims board may not be taken after 20 days, yet it will be considered by the Board of Contract Adjustment if taken within a reasonable time after the adverse decision by the bureau board. (Ford Motor Co. and Taft-Pierce Manufacturing Co., Case No. 2300, III these Dec., 542.)

This board can not take jurisdiction of a claim under the act of March 2, 1919, filed on December 12, 1919. (Franklin Knitting Mills, Case No. 1763, III these Dec., 128.)

Where goods specified in such Quartermaster General's purchase orders are delivered and paid for, the contracts are terminated, and this board can make no award on the basis of such contracts for un-

JURISDICTION—Continued.

liquidated damages. (E. C. Gatlin Importing Co., Case No. 661, III these Dec., 757.)

The Board of Contract Adjustment has no jurisdiction to grant relief to claimant for damages growing out of a formal contract fully performed. (High Clothing Co. (Inc.), Case No. 471, III these Dec., 935.)

When the telegram is dated subsequent to November 12, 1918, there is no claim for adjustment within the meaning of the act of March 2, 1919, since this act authorizes only the adjustment of contracts "entered into during the present emergency and prior to November 12, 1918." (Huttig Sash & Door Co., Case No. 2425, III these Dec., 928.)

Where claimant had a formal proxy-signed contract to manufacture certain articles for the Government, and such contract has been terminated or canceled pursuant to order of the Secretary of War, the Secretary of War or the Board of Contract Adjustment has jurisdiction under the act of March 2, 1919, to adjust a claim arising out of the termination of said contract. (C. Kenyon Co. (Inc.), Case No. 732, III these Dec., 327.)

The Secretary of War has jurisdiction under the act of March 2, 1919, to adjust a proxy-signed contract, even after such contract has been terminated. (Harry E. Lazarus, Case No. 733, III these Dec., 279.)

In the absence of the act of March 2, 1919, the power of the Secretary of War to settle or adjust claims against the War Department is limited generally to two classes of cases: (a) Those which arise upon contracts with the War Department executed in the manner prescribed by Revised Statutes, or in the manner authorized by some exception thereto; (b) to the recommending to the Treasury Department of payment upon the basis of quantum meruit or quantum valebat for necessary goods and services actually received and accepted by the War Department. (Lewis Manufacturing Co., Case No. 1713, III these Dec., 914.)

Board has no jurisdiction of an agreement alleged to have been made about August 22, 1919. (William H. Lytell, Case No. 2293, III these Dec., 76.)

The War Department Board of Contract Adjustment has no jurisdiction of claims for unliquidated damages growing out of an alleged breach of contract when such contract has been executed in the manner provided by law. If the agreement, however, upon which the claim is founded has not been executed in the manner provided by law, the Board has jurisdiction to exercise such judgment and discretion in the settlement of the claim as the merits of the same warrant. (Act of Mar. 2, 1919.) (The National Laundry Co., Case No. 1, III these Dec., 585.)

See former decision of the Board, Volume III, page 585. (National Laundry Co., Case No. 1, Rehearing, III these Dec., 593.)

Where, after the termination of a formal contract, a claim is made for unliquidated damages arising from the failure of the Government to provide certain facilities which the contract obligated the Government to supply, the Secretary of War has no power to adjust the same. (National Laundry Co., Case No. 1, Rehearing, III, these Dec., 593.)

The Secretary of War and this Board as his agent have jurisdiction to reform a contract in a clear case of mutual mistake, because in such

JURISDICTION—Continued.

a case it is a part of the contracting power of the Secretary of War to restate or reform the first effort at reducing an agreement to writing in order to get a correct statement of the contract. (Pahl-Hoyt Co., Case No. 2230, III these Dec., 919.)

If there was such an agreement, claimant would not be entitled to recover because its only obligations or expenses incurred were admittedly of date of November 14, 1918. (St. Louis Wood Products Co., Case No. 1677, III these Dec., 200.)

Where an informal contract was entered into November 15, 1918, the Secretary of War has no authority under the act of March 2, 1919, to adjust the same. (Scientific Utilities Co. (Inc.), Case No. 1967, III these Dec., 39.)

The Secretary of War and the Board of Contract Adjustment have no jurisdiction to amend the formal contract, because it has been terminated by performance. (Sewell-Clapp-Envelopes, Case No. 633, III these Dec., 32.)

The Secretary of War and this Board have no jurisdiction to give relief where a formal contract has been fully performed. (Henry Sonneborn & Co. (Inc.), Case No. 333, III these Dec., 676.)

Where a formal contract, in accordance with a provision thereof, was canceled for contractor's default by the Government, a claims board has no jurisdiction to consider a claim presented by the contractor. (The Starr Piano Co., Case No. 1924, III these Dec., 819.)

Where claimant on suspension of a contract was orally instructed on November 12, 1918, to hold Government materials until removed by the Government, the implied agreement for payment of storage, based upon these instructions, was made too late to come within the provisions of the act of March 2, 1919. (The Sweets Co. of America, Case No. 2294, III these Dec., 897.)

Where a formal contract has been terminated, the damages to which the contractor is entitled by reason of the breach by the United States are uncertain and unliquidated, and this Board has no jurisdiction to adjust the matter. (United Disposal & Recovery Co., Case No. 2397, III these Dec., 815.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; CLAIMS, AMENDMENT; CLAIMS, FILING; CLAIMS, SUBCONTRACTORS; CONTRACTS, AFTER NOVEMBER 12, 1918; CONTRACTS, BREACH; CONTRACTS, CANCELLATION; CONTRACTS, CONSTRUCTION; CONTRACTS, FORMAL; CONTRACTS, NONPERFORMANCE; CONTRACTS, REFORMATION; CONTRACTS, SUPPLEMENTAL; LOSS NOT SUSTAINED.

L.**LABOR.**

LABOR AND MATERIALS FOR COST-PLUS AGREEMENT.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

LABOR AND MATERIALS USED IN REPAIR.

See COSTS, LEGITIMATE.

LABOR DISPUTE CLAUSE.

See CONTRACTS, CONSTRUCTION.

LABOR DISPUTES.

See CONTRACTS, CONSTRUCTION.

LACK OF CONSIDERATION IN CONTRACTS.

See CONTRACTS, CONSIDERATION.

LATE DELIVERIES.

See ACCEPTANCE.

LAWSUITS, COST OF DEFENDING.

See CONTRACTS, CONSTRUCTION.

LEASE, AUTHORITY TO CONTRACT FOR.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

LIABILITY.

LIABILITY, PRIMARY AND SECONDARY.

See CONTRACTS, ADJUSTMENT.

LIABILITY OF PARTIES.

Where the Government hired claimant's teams, plows, and other equipment for leveling an aviation field at a rental that included the feed and care of the mules, but for claimant's convenience erected stables for same on the field, and due to the muddy condition of the stables some of the mules died and some became diseased, in the absence of an agreement by the Government to care for or be responsible for claimant's mules and equipment, claimant is not entitled under the act of March 2, 1919, to reimbursement on account of such mules or on account of stolen equipment. (Joseph A. Byrnes, Case No. 401, III these Dec., 209.)

Where a fire occurs without the fault or negligence of the contractor and destroys partly finished products and raw material purchased for the performance of the contract, the loss falls on the United States and claimant is entitled to be reimbursed the cost of the property destroyed. (Canada Wire & Cable Co. (Ltd.), Case No. 2319, III these Dec., 236.)

Where claimant had on hand, at the time of the armistice, certain completed articles, and it is not shown that it had the promise of the Government for any specific orders for same, there is no liability on the part of the Government under a contract, express or implied, for the value of said articles or any part thereof. (Gould-Mersereau Co., Case No. 367, III these Dec., 955.)

Where claimant was under obligations, by a formal contract, to do certain laundry work for the Government, and also to do similar work for officers and enlisted men, at prices specified in the contract, there was no obligation on the part of the Government to pay claimant for services rendered to said officers and enlisted men or to collect the bills for said services, in the absence of a provision to that effect in the contract. (National Laundry Co., Case No. 1, rehearing, III these Dec., 593.)

Where the rules and regulations of the United States Fuel Administrator provided that all shipments of coal be subject to diversion on orders of a fuel administrator and that when so diverted the person receiving the coal should be obliged to pay the shipper therefor, and where the claimant on orders of the district fuel administrator at Knoxville, Tenn., shipped a car of coal to the camp quartermaster at Macon, Ga., for the United States Government and such shipment was diverted by the local fuel administrator at Macon to another party, such shipment will be presumed to have been made in view of such rules and regulations and that claimant thereby agreed in advance of such shipment that the coal might be diverted in

LIABILITY—Continued.

transit so as to divest liability from the United States Government to pay therefor. (North Jellico Coal Co., Case No. 666, III these Dec., 720.)

Where claimant entered into an agreement to deliver to the United States Government a quantity of dehydrated carrots packed in cans, the Government is under no obligation under the act of March 2, 1919, to reimburse the claimant for loss sustained in spoiled vegetables caused by delay in the shipment of cans, where the evidence fails to show that the Government agreed to furnish the cans. (Penn Yan Cider Co., Case No. 2038, III these Dec., 114.)

Where claimant had a contract for the delivery of cordwood, after the suspension of which a fire occurred and destroyed a quantity of wood, which claimant had cut but had not delivered, the loss must be borne by the claimant, since the title to the wood was in him and there was nothing to bring the case within the rule that where a delivery has been delayed through the fault of one of the parties the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. (A. G. Pickett, Case No. 2302, III these Dec., 908.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT.

LOSS.

Loss of Power to Amend.

See JURISDICTION.

Loss Not Sustained.

Claimant is not entitled to relief for the further reason that after the cancellation it used the materials which are the subject of this claim in its commercial trade and fails to show any loss. (Phillip Carey Co., Case No. 1491, III these Dec., 1028.)

Where a canner is instructed to retain 40 per cent of its product for the use of the Army, and upon cancellation of such instructions sells its product at a higher price than that fixed by the Government, claimant has suffered no loss and therefore is not entitled to relief under the act of March 2, 1919. (The Hawksbill Cannery, Case No. 1512, III these Dec., 349.)

Where claimant is unable to show that any work was done under an alleged contract, or that any expenditures or commitments were made on the faith of the contract, claimant is not entitled to relief under the act of March 2, 1919. (Iron King Overalls Co., Case No. 2333, III these Dec., 461.)

See also CONTRACTS, NONPERFORMANCE; JURISDICTION.

M.**MAINTENANCE AND OPERATION OF COMMISSARY.**

See COSTS, LEGITIMATE.

MATERIAL.

MATERIAL ON HAND HELD FOR NEW CONTRACT.

See CONTROLLED INDUSTRY.

MATERIAL PURCHASED FOR CANCELED CONTRACT.

See CONTRACTS, CANCELLATION.

MATERIALS PURCHASED IN ANTICIPATION OF ORDERS.

See CONTRACTS, ANTICIPATION.

MAXIMUM FEE.

See CONTRACTS, COST-PLUS.

MEASURE OF ADJUSTMENT.

See CONTRACTS, ADJUSTMENT.

MEDICAL EXPENSE.

See COSTS, LEGITIMATE.

MEETING OF MINDS.

See CONTRACTS, WHAT CONSTITUTES.

MERGER.

See CONTRACTS, WRITTEN.

METHOD OF ADJUSTMENT.

See CONTRACTS, ADJUSTMENT.

MISSING PARTS, INSPECTION.

See CONTRACTS, IMPLIED.

MISTAKE.**MISTAKE IN PATTERNS.**

See EXPENSES, EXTRA.

MISTAKE IN RELEASE.

See RELEASE.

MISTAKE IN STATEMENT OF PRIOR CLAIM NOT FATAL TO RECOVERY.

See REIMBURSEMENT.

MISTAKE, MUTUAL.

Where a contractor and a Government officer agreed that a formal contract should be canceled and execute a cancellation agreement under a mutual mistake of fact, both parties believing that no expenses had been incurred thereunder, the cancellation agreement will be rescinded and the original contract considered as subject to settlement. (Eastman Kodak Co., Case No. 2169, III these Dec., 831.)

See also CONTRACTS, REFORMATION.

MISTAKE, UNILATERAL.

See CONTRACTS, REFORMATION.

MODIFICATION OF CONTRACT.

See CONTRACTS, AMENDMENT.

MUTUAL MISTAKE.

See MISTAKE, MUTUAL.

MUTUAL RELEASE.

See RELEASE.

N.**NATIONAL DEFENSE, COUNCIL OF, RECOMMENDATIONS.**

See CONTRACTS, RECOMMENDATION.

NATIONAL WAR LABOR BOARD, DECISIONS.

See CONTRACTS, IMPLIED.

NATIONAL WAR LABOR BOARD, RECOMMENDATIONS.

See AWARD, RECOMMENDATION.

NEGOTIATIONS.**NEGOTIATIONS MERGED INTO WRITTEN CONTRACT.**

See CONTRACTS, WRITTEN.

NEGOTIATIONS ONLY.

See CONTRACTS, WHAT CONSTITUTES.

NEGOTIATIONS—Continued.

NEGOTIATION, SUBSEQUENT.

See **CONTRACTS, CANCELLATION.**

NONCOMPLIANCE WITH PURCHASE ORDER.

See **CONTRACTS, WHAT CONSTITUTES.**

O.

ONE DIVISION ACTING FOR ANOTHER.

See **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

ORAL ORDER.

See **CONTRACTS, IMPLIED.**

ORDER, ADDITIONAL.

See **EXPENSES, EXTRA.**

ORDERS, ANTICIPATED.

See **CONTRACTS, ANTICIPATION.**

ORDNANCE DEPARTMENT, AUTHORITY.

See **JURISDICTION.**

OVERHEAD.

OVERHEAD EXPENSE.

See **EXPENSES, OVERHEAD.**

OVERHEAD WHERE CONTRACT TERMINATED.

See **JURISDICTION.**

OVERAGE, RECOVERY.

See **RELEASE.**

OVERRUN BEYOND CONTRACT ALLOWANCE.

See **QUANTUM MERUIT.**

OVERTIME.

See **EXPENSES, OVERTIME.**

P.

PART PERFORMANCE.

See **REIMBURSEMENT.**

PARTIES, MISTAKE IN.

See **SALES.**

PASSING OF TITLE.

See **CONTRACTS, CONSTRUCTION.**

PAYMENT DELAY.

See **INTEREST, IN ABSENCE OF STIPULATION.**

PAYMENT OF CLAIM AFTER FILING.

See **CLAIMS, DISMISSED.**

PERFORMANCE, SUBSTANTIAL.

Where claimant substituted the cotton, not for virgin wool as permitted in the revised specifications, but for wool waste, the variation was so slight as not to bar recovery. Nor does the fact that an analysis showed that some of the product contained 15 per cent of cotton bar recovery. (Bates & Innes (Ltd.), Case No. 298, III these Dec., 262.)

See also **CONTRACTS, AMENDMENT; CONTRACTS, TERMINATION.**

PERMANENT AND TEMPORARY BUILDING CONSTRUCTION.

See **REIMBURSEMENT.**

PLANT EQUIPMENT.

PLANT EQUIPMENT, DEPRECIATION.

See AMORTIZATION.

PLANT AND EQUIPMENT, "SPECIALLY PROVIDED."

See CONTRACTS, ANTICIPATION.

PREPARATION.

PREPARATION FOR AN ANTICIPATED CONTRACT.

See CONTRACTS, ANTICIPATION.

PREPARATION TO PERFORM CONTRACT.

See CONTRACTS, ANTICIPATION.

PRESIDENT, POWERS.

Where the United States Fuel Administrator, as an agency of the President, under the authority vested in him by the act of August 10, 1917 (known as the Lever Act), made certain rules and regulations for the more effective enforcement of said act, such rules and regulations have the force and effect of law. (North Jellico Coal Co., Case No. 666, III these Dec., 720.)

The term "the above prices are subject to revision by the Federal Trade Commission or other Government body" used in a contract for the manufacture of corrugated-steel sheets contemplates an equitable adjustment or revision. Therefore, where the claimant purchased material with which to perform his contract at the market price prior to the date the price of steel was reduced by order of the President, which material is actually used in the manufacture of the goods ordered, the action of the President in fixing the price of corrugated-steel sheets was not such a revision as was contemplated by the contract. (Stark Rolling Mills Co., Cases Nos. 1658 and 2203, III these Dec., 813.)

PRICE.

PRICE, CONTRACT.

See CONTRACT PRICE.

PRICE FIXED IN ACCORDANCE WITH AGREEMENT.

See PRICE FIXING.

PRICE FIXING.

Where an authorized agent of the Government notified claimant that the Government would require 12½ per cent of its pineapple pack for the season of 1918, and invoices should be made and payment made on the basis of 75 per cent, and it was agreed that the balance of the payment should be made according to a definite price to be fixed by the Government contracting officer on the basis of cost plus a reasonable profit as ascertained by the Federal Trade Commission, and the price was fixed by the contracting officer in accordance with agreement, the claimant will be required to accept settlement on that basis. (Hawaiian Cannlers Co. (Ltd.), Case No. 1989, III these Dec., 426.)

PRICE REVISION BY FEDERAL TRADE COMMISSION.

See PRESIDENT, POWERS.

PRIMARY AND SECONDARY LIABILITY.

See CONTRACTS, ADJUSTMENT.

PRIOR COMMITMENTS.

See CONTRACTS, ANTICIPATION.

PRIVITY OF CONTRACT.

See SALES.

PRODUCTION.**PRODUCTION, CONTINUOUS.**

See **CONTRACTS, IMPLIED.**

PRODUCTION, STIMULATION.

See **CONTRACTS, ANTICIPATION.**

PROFITS.**PROFITS, NET.**

Under an express oral contract that the Government should pay such a price for materials delivered as would secure the contractor a net profit of 25 cents per ton, in determining such profit due allowance must be made for expenditures for special facilities ordered by the Government or made necessary by its requirements and worth less to claimant than their cost. (Charlestown Sand & Gravel Co., Case No. 2166, III these Dec., 615.)

PROFITS, PROSPECTIVE.

Where a claim is based upon the suspension of a Government contract prospective profits will not be allowed. (Alcohol Products Co., Case No. 657, III these Dec., 535.)

Prospective profits can not be recovered upon the uncompleted portion of an informal contract with the Government which has been suspended. (American Can Co., Case No. 2216, III these Dec., 351.)

See also **CONTRACTS, ADJUSTMENT.**

PROMISE.**PROMISE OF AWARD.**

See **AWARD, RECOMMENDATION.**

PROMISE OF CONTRACT.

See **CONTRACTS, PROMISE.**

PROMISE OF RECOMMENDATION IF ARTICLE APPROVED.

See **CONTRACTS, PROMISE.**

PROSPECTIVE PROFITS.

See **PROFITS, PROSPECTIVE.**

PROVISIONAL PRICE.

See **CONTRACT PRICE.**

PROXY-SIGNED CONTRACTS.

See **JURISDICTION.**

PUBLIC LIABILITY INSURANCE.

See **INSURANCE, PUBLIC LIABILITY.**

PURCHASE ORDERS.

Where a purchase order is issued after the delivery of goods under an informal contract it is of no effect except as evidence of the agreement. (Thomas Roberts & Co. (Factors for W. S. Davidson), Case No. 1606, III these Dec., 731.)

Where a purchase order does not come within the exceptions to United States Revised Statutes, section 3744, as found in United States Compiled Statutes 6853b, and the regulations made in compliance therewith, it is itself, when accepted, an informal agreement. (Thomas Roberts & Co. (Factors for W. S. Davidson), Case No. 1606, III these Dec., 731.)

See also **CONTRACTS, FORMAL; CONTRACTS, INFORMAL.**

PURCHASE ORDER, NONCOMPLIANCE.

See **CONTRACTS, WHAT CONSTITUTES.**

Q.

QUANTUM MERUIT.

Where goods ordered are not accepted there can be no settlement on a quantum meruit basis. (Huttig Sash & Door Co., Case No. 2425, III these Dec., 928.)

Where claimant had the right to sell certain articles at certain Government-fixed prices or otherwise, or to hold the same in anticipation of commandeering proceedings by the Government, and claimant elected to hold the same, and the Government did not commandeer the articles, and afterwards all Government restrictions upon the sale of the articles were removed, there was no delivery or acceptance of said articles by the United States which would authorize the Secretary of War to recommend payment for the same upon a quantum meruit; and no agreement or obligation created on the part of the Government which the Secretary of War would have any right to pay or discharge. (Lewis Mfg. Co., Case No. 1713, III these Dec., 914.)

Where the Government accepts an overrun on a formal contract greater than that allowed by its terms, the surplus over the average allowed by the contract should be paid for at the contract price by the issue of a certificate of fair value. (J. Thompson Riday & Son Co., Case No. 360, III these Dec., 763.)

Where claimant rendered services and furnished material in receiving, storing, and packing for shipment certain supplies for the overseas army, the United States Government having received the benefit of such services and material, is obligated to compensate the claimant for the reasonable value thereof, and where claim was filed too late for adjustment under the act of March 2, 1919, adjustment must be made under section 368, Compiled Statutes, in the Treasury Department, by the use of the certificate of fair value, under Savage Arms Co. Case, 25 Comp. Dec. 529. (York Manufacturing Co., Case No. 2279, III these Dec., 59.)

See also CONTRACTS, INTERFERENCE; QUANTUM VALEBAT.

QUANTUM VALEBAT.

Where after settlement of a suspended formal contract claimant discovers materials which were through its own mistake omitted from the settlement, and the Government thereafter orders and accepts delivery of such materials, claimant is entitled to be paid the reasonable value of said materials, and a certificate of fair value should be issued to facilitate payment by the Treasury Department. (English & Mersick Co., Case No. 2376, III these Dec., 1035.)

Where a purchasing agent at the Watertown Arsenal called claimant by telephone and ordered 174 feet of steel, and told claimant that the order number would be 646, and claimant proceeded to fill the order, and afterwards received a written order, No. 1484, for a similar quantity of steel, and proceeded to fill that one as a second order, claimant was justified under the circumstances in considering the second order as an additional independent order. (Hawkrige Bros. Co., Case No. 1960, III these Dec., 471.)

See also QUANTUM MERUIT.

QUARTERMASTER GENERAL'S PURCHASE ORDER.

See CONTRACTS, FORMAL.

QUASI CONTRACTS.

Where a contract for the manufacture of munitions provides that the Government will furnish certain of the component materials "without cost to the contractor," and that such materials should be consigned to the Government inspector at claimant's plant, but the materials were consigned to claimant direct, and large demurrage charges accrued thereon, which the railroad company charged claimant, and which it was necessary for claimant to pay, claimant is entitled to reimbursement of the sum so paid where such charges did not result from neglect of claimant, because of a quasi contractual obligation raised by the payment by it of a Government obligation. (Eddystone Munitions Co., Case No. 2020, III these Dec., 1000.)

Where claimant received a compulsory order issued under section 120 of the National Defense Act of June 3, 1916, requiring claimant to deliver to the Government all tolul manufactured between certain dates, and the order was suspended during the named period, there was a contract implied in law by which the Government was bound to take all claimant's tolul produced during the entire period. This contract is within the provisions of the act of March 2, 1919, and is to be adjusted in accordance with the act and the regulations issued thereunder. (The Peoples Gas Light & Coke Co., Case No. 1737, III these Dec., 664.)

See also CONTRACTS, IMPLIED.

B.**RAW MATERIALS, TITLE PASSING.**

See CONTRACTS, CONSTRUCTION.

RECEIVING CHECK.

See CLAIMS, SUBCONTRACTORS.

RECOMMENDATION.

RECOMMENDATION BY COUNCIL OF NATIONAL DEFENSE.

See CONTRACTS, RECOMMENDATION.

RECOMMENDATION DOES NOT CONSTITUTE A CONTRACT.

See CONTRACTS, WHAT CONSTITUTES.

RECOMMENDATION OF AWARD.

See AWARD, RECOMMENDATION.

RECOMMENDATION OF CONTRACT.

See CONTRACTS, RECOMMENDATION.

RECOVERY FOR REJECTED ARTICLES IN EXISTENCE.

See REIMBURSEMENT.

REFORMATION OF CONTRACT.

See CONTRACTS, REFORMATION.

REFUSAL TO SIGN CONTRACT.

See CONTRACTS, WHAT CONSTITUTES.

REIMBURSEMENT.

There can be no recovery for existing articles rejected within the terms of the contract in accordance with the decision of the representative of the Chief of Ordnance. (Anniston Steel Co., Case No. 2247, III these Dec., 767.)

There may be circumstances under which a claim based on a subcontract will not be barred, although claimant may have stated in a

REIMBURSEMENT—Continued.

former claim, filed with a claims board and allowed by it, that the amount thereon claimed represented full and complete payments to vendors and subcontractors and all claims that they may have against claimant on account of the contract upon which claim is based. (Ford Motor Co. and Taft-Pierce Manufacturing Co., Case No. 2300, III these Dec., 542.)

Where claimant was instructed by the Government to procure immediate construction at Government expense of an inexpensive temporary building for assembling monoplanes, and owing to difficulty and delay involved in procuring materials for such a building claimant procured the construction of a permanent building, there was an agreement within the meaning of the terms of the act of March 2, 1919, under which claimant is entitled to reimbursement to the extent of the cost of such a temporary building at the time the instructions were given, less its present salvage value. (Motor Products Corp., Case No. 1572, III these Dec., 219.)

Where claimant was performing Government contracts and was asked to take another contract for 40,000 yards of chevron backing felt, and to enable it to take this contract claimant was relieved of further performance of one of its other contracts, and an award was made for the new contract, and claimant retained sufficient material to perform the new contract, claimant will be entitled to recover loss on material so retained. (S. Stroock & Co., Case No. 90, III these Dec., 359.)

Where claimants complied with the request of the Air Service officers and began the construction of the building, and afterwards are notified by such officers to stop such construction, as the Government would not enter into the lease, claimants are not entitled to reimbursement of the expenses incurred. (Walker & Johnson, Case No. 1931, III these Dec., 877.)

Where the United States Government agreed to furnish claimant purchasers for 500,000 pounds of yarn, the consideration for the agreement being the promise of claimant to furnish the yarn to certain manufacturers doing Government work, the United States Government is under obligation, under the act of March 2, 1919, to reimburse claimant for its loss in expenditures necessarily made in preparing the portion of such yarn for which no purchasers were furnished. (Wellington, Sears & Co., as Agents for Hamilton Woolen Co., Case No. 345, III these Dec., 412.)

Where, under such an agreement, a purchaser is produced who contracts with claimant to buy 200,000 pounds of yarn but only takes 75,000 pounds thereof, the United States Government is under no obligation, under the act of March 2, 1919, to claimant, by reason of the failure of such purchaser to perform its contract with claimant. (Wellington, Sears & Co. as agents for Hamilton Woolen Co., Case No. 345, III these Dec., 412.)

See also AGENTS, AUTHORITY TO BIND GOVERNMENT; CONTRACTS, ANTICIPATION; CONTRACTS, IMPLIED; EXPENSES, REIMBURSEMENT; REJECTIONS.

REINSTATEMENT OF SUSPENDED CONTRACT.

See CONTRACTS, SUSPENSION.

REJECTIONS.

Where, under a contract providing for the inspection of manufactured articles and rejection of those found to be defective (the decision of the Chief of Ordnance or his representative to be final), an inspector rejects certain articles and an appeal is taken to higher authority, but the articles are destroyed by claimant, there can be no recovery for such destroyed articles because at a subsequent date the representative of the Chief of Ordnance lays down a standard under which such articles would probably have been accepted. (Anniston Steel Co., Case No. 2247, III these Dec., 767.)

See also REIMBURSEMENT.

RELEASE.

Release of prime contractor also releases the Government. Where the subcontractor, having no contractual relations with the Government in the matter, releases the prime contractor from all liability he can not thereafter obtain relief from the Government under the act of March 2, 1919. (Franklin Knitting Mills, Case No. 1763, III these Dec., 128.)

Where the parties to a contract signed a supplemental agreement in which the contractor released "the United States from any and all claims which it may have by reason of the termination of the said contract," the contractor is not entitled to an award on a claim against the Government arising out of the original contract. (Isco Chemical Co., Case No. 1678, III these Dec., 222.)

In such a case, especially is there no liability on the part of the Government, claimant having settled its formal contracts and stated in such settlement papers that it agreed that it had no other claims against the Government. (Modern Pants Co., Case No. 2204, III these Dec., 203.)

Where claimant had a proxy-signed written contract for 300,000 pairs of puttees which was suspended when 86½ per cent performed, and an award of \$54,000 was made and accepted, and the customary full release given to the Government, claimant can not afterwards recover for 10 per cent overage, no mention of overage being made in the contract, on the theory that there had been delivered and the Government had accepted and paid for 10 per cent overage on previous contracts. (Alexander Propper & Co., Case No. 534, III these Dec., 300.)

The claim that there was mutual mistake in supposing that the release in a supplemental agreement covered only materials owned by claimant and not materials owned by the Government, is held to be without merit, and the release is a bar to this claim. (The Sweets Co. of America, Case No. 2294, III these Dec., 897.)

See also CLAIMS, SUBCONTRACTORS; CONTRACTS, CONSTRUCTION; CONTRACTS, SETTLEMENT; CONTRACTS, SUPPLEMENTAL; EVIDENCE; JURISDICTION; STORAGE.

REMEDIAL ACT SHOULD BE LIBERALLY CONSTRUED.

See ACT OF MARCH 2, 1919, CONSTRUCTION.

RENTED EQUIPMENT.

See LIABILITY OF PARTIES.

REOPENING SETTLEMENT.

See CONTRACTS, SETTLEMENT.

REPAIRS.

See COSTS, LEGITIMATE.

REPRESENTATION.

REPRESENTATION OF GOVERNMENT NEEDS.

See **CONTRACTS, IMPLIED.**

REPRESENTATION REGARDING FURTHER ORDERS.

See **CONTRACTS, PROMISE.**

REQUISITION BY FOOD ADMINISTRATION.

See **AGENTS, AUTHORITY TO BIND GOVERNMENT.**

RESCISSION.

RESCISSION BECAUSE OF MISTAKE.

See **MISTAKE, MUTUAL.**

RESCISSION OF CONTRACT.

See **JURISDICTION.**

RESERVATIONS IN RELEASE.

See **CONTRACTS, SETTLEMENT.**

RESPONSIBILITY FOR CARE OF RENTED EQUIPMENT.

See **LIABILITY OF PARTIES.**

RESTRICTIONS UPON REGULAR OPERATIONS.

See **RELEASE.**

REVISED STATUTES.

REVISED STATUTES, SEC. 1901.

See **INTEREST, IN ABSENCE OF STIPULATION.**

REVISED STATUTES, SEC. 3828.

See **CONTRACTS, UNLAWFUL.**

REVISED STATUTES, SEC. 3744 AND 3745.

See **CONTRACTS, FORMAL.**

RIGHTS.

RIGHTS OF PARTIES.

See **CONTRACTS, CONSTRUCTION.**

RIGHTS AND LIABILITIES OF PARTIES.

See **CONTROLLED INDUSTRY.**

RIGHTS OF SUBCONTRACTOR.

See **CLAIMS, SUBCONTRACTOR.**

RIGHTS OF SURETY AGAINST CREDITOR.

See **SURETY.**

RULES AND REGULATIONS OF FUEL ADMINISTRATOR.

See **PRESIDENT, POWERS.**

S.**SALARIES.**

See **COSTS, LEGITIMATE.**

SALES.

Where goods are ordered of one person and supplied by another, the acceptance and use by the person ordering them without notice that they have not been supplied by the one of whom they were ordered creates no privity of contract between the person ordering the goods and the person supplying them. (Huttig Sash & Door Co., Case No. 2425, III these Dec., 923.)

See also **ACCEPTANCE.**

SECRETARY OF WAR.

SECRETARY OF WAR, JURISDICTION.

See **JURISDICTION.**

SECRETARY OF WAR, PURPOSE OF.

See **ACT OF MARCH 2, 1919, CONSTRUCTION.**

SETTLEMENT CONTRACTS.

See **CONTRACTS, SETTLEMENT.**

SETTLEMENT OF INFORMAL CONTRACT PRIOR TO ACT OF MARCH 2, 1919.

See **CONTRACTS, INVALID.**

SHIPMENT UNDER FORMAL CONTRACT DIVERTED.

See **CONTRACT PRICE.**

SPECIAL FACILITIES. •

See **CONTRACTS, CONSTRUCTION.**

SPECIFICATIONS.

SPECIFICATIONS, CHANGE.

See **CONTRACTS, IMPLIED.**

SPECIFICATIONS, SUBSTANTIAL COMPLIANCE.

Where claimant, under such contract and under the circumstances relevant to specifications, has manufactured and has ready to deliver 43,490 pairs of such puttees, the Government is obligated under the act of March 2, 1919, to accept and pay the reasonable value thereof, if on inspection it is found that there was substantial compliance with the specifications. (Hawthorn Mills (Ltd.), Case No. 408, III these Dec., 275.)

STIMULATION OF PRODUCTION.

See **CONTRACTS, ANTICIPATION.**

STORAGE.

A claim for storage is without merit where goods manufactured by claimant were not required to be kept by claimant an unreasonable length of time. Other claims based upon alleged delay in covering the goods, including a claim for reduced production claimed to be due to restrictions thereby placed upon regular operations, are equally without merit. (West Lafayette Manufacturing Co., Case No. 554, III these Dec., 886.)

A contractor who has been fully paid under a supplemental settlement contract containing a release is not entitled to payment for the above-mentioned additional items. (West Lafayette Manufacturing Co., Case No. 554, III these Dec., 886.)

See also **INTEREST, ON CLAIMS AGAINST GOVERNMENT; RELEASE.**

SUBCONTRACT MADE BY GOVERNMENT ORDER.

See **CONTRACT, IMPLIED.**

SUBCONTRACTORS.

SUBCONTRACTOR, KNOWLEDGE AND CONSENT OF AN AGENT OF SECRETARY OF WAR.

See **CLAIMS, SUBCONTRACTORS.**

SUBCONTRACTORS, CLAIMS.

See **CLAIMS, SUBCONTRACTORS.**

SUBSEQUENT NEGOTIATIONS.

See **CONTRACTS, CANCELLATION.**

SUBSTANTIAL COMPLIANCE.

SUBSTANTIAL COMPLIANCE WITH SPECIFICATIONS.

See **SPECIFICATIONS, SUBSTANTIAL COMPLIANCE.**

SUBSTANTIAL COMPLIANCE WITH TERMS OF CONTRACT.

See **CONTRACTS, CANCELLATION.**

SUBSTANTIAL PERFORMANCE.

See PERFORMANCE, SUBSTANTIAL.

SUPPLEMENTAL AGREEMENTS.

See CONTRACTS, SUPPLEMENTAL.

SUPPLEMENTAL CONTRACTS.

See CONTRACTS, SUPPLEMENTAL.

SUPPLY CIRCULARS NOS. 88 AND 111.

See AGENTS, AUTHORITY TO BIND GOVERNMENT.

SURETY.

Where claimant was surety on a bond conditioned for repayment of money loaned to a manufacturer by the Government and on the manufacturer becoming bankrupt the Government established the **priority of its claim against the bankrupt's estate** and endeavored to find purchasers for war materials left on the hands of the bankrupt, which materials greatly depreciated on the signing of the armistice, no agreement can be implied under the act of March 2, 1919, by which claimant would be entitled to be credited on its liability under said bond with the difference between the value of the materials prior to the armistice and their value after the signing of the armistice. (New Amsterdam Casualty Co., Case No. 627, III these Dec., 962.)

Where the depreciation of such materials was not due to negligence or any unreasonable delay on the part of the Government, the surety (claimant) is not entitled to be exonerated to the extent of such depreciation. (New Amsterdam Casualty Co., Case No. 627, III these Dec., 962.)

SUSPENSION.

SUSPENSION AND REINSTATEMENT OF CONTRACT.

See CONTRACTS, SUSPENSION.

SUSPENSION OR CANCELLATION.

See CONTRACTS, CONSTRUCTION.

T.**TAKING OVER OF MATERIALS.**

See CONTRACTS, INTERFERENCE.

TECHNICAL INFORMATION.

See COSTS, EXPERIMENTAL.

TELEPHONE CALLS.

See COSTS, LEGITIMATE.

TELEGRAPHIC ORDER FOR SUPPLIES.

See CONTRACTS, WHAT CONSTITUTES.

TEMPORARY AND PERMANENT BUILDING CONSTRUCTION.

See REIMBURSEMENT.

TERMINATION.

TERMINATED PROXY-SIGNED CONTRACT.

See CONTRACTS, TERMINATION.

TERMINATION CLAUSE, CONSTRUCTION.

See CONTRACTS, CONSTRUCTION.

TERMINATION OF CONTRACT.

See CONTRACTS, TERMINATION.

TIME LIMIT FOR FILING CLAIMS.

See CLAIMS, FILING.

TIME OF MAKING INFORMAL AGREEMENT.

See JURISDICTION.

TITLE PASSING.

See CONTRACTS, CONSTRUCTION.

TRAVELING EXPENSES.

See COSTS, LEGITIMATE.

U.

UNABSORBED OVERHEAD EXPENSES.

See EXPENSES, OVERHEAD.

UNAMORTIZED FACILITIES.

See AMORTIZATION.

UNDERSTANDING FOR CONTINUOUS PRODUCTION.

See CONTRACTS, IMPLIED.

UNILATERAL MISTAKE.

See CONTRACTS, REFORMATION.

U. S. FOOD ADMINISTRATION BULLETIN.

See INTEREST, ON CLAIMS AGAINST GOVERNMENT.

UNLIQUIDATED DAMAGES.

See JURISDICTION.

USE OF CLAIMANT'S TELEPHONE.

See COSTS, LEGITIMATE.

V.

VAGUE AGREEMENT.

See CONTRACTS, WHAT CONSTITUTES.

VOID SUPPLEMENTAL CONTRACT.

See CONTRACTS, INVALID.

W.

WAIVER.

Where the contractor was behind in its deliveries, but the Government continued to accept deliveries, the Government can not long afterwards cancel the contract because of such delays in delivery; the Government being deemed to have waived any advantage it might have taken because of late deliveries. (Frieberg Lumber Co., Case No. 561, III these Dec., 227.)

Where a contractor fails to deliver articles within the time fixed in the contract, but thereafter did deliver a portion thereof, which was accepted by the Government, the breach of the contract as to the time of delivery is waived by the Government. (Marsh Manufacturing Co., Case No. 2226, III these Dec., 994.)

Claimant waived any right it might have had of a reformation by amending his voucher and accepting payment. (Spltdorf Electrical Co., Case No. 2313, III these Dec., 511.)

The United States waives a breach where, with knowledge thereof, it permits the contractor to incur further expense under the belief, or with reasonable grounds for belief, that it will not enforce its options on account of the breach. A letter notifying the contractor that an effort will be made to adjust contractor's claim for damages

WAIVER—Continued.

growing out of an order to stop production, is evidence that no breach was claimed. (Taft Pierce Manufacturing Co., Case No. 2375, III these Dec., 323.)

See also **CONTRACTS, BREACH ; CONTRACTS, REFORMATION.**

WAR SERVICE COMMITTEE ON FURNITURE, FIXTURES, AND ALLIED WOOD INDUSTRIES.

See **AGENTS, AGENTS.**

WAGES BELOW STANDARD.

See **CONTRACTS, CONSTRUCTION.**

WASTE MATTER.

See **CONTRACTS, CONSTRUCTION.**

WAR INDUSTRIES BOARD, ALLOCATION.

See **ALLOCATION.**

WEIGHT OF EVIDENCE.

See **EVIDENCE.**

WHEN NOT ENTITLED TO BONUS.

See **BONUS.**

WHERE AWARD NOT FINAL.

See **JURISDICTION.**

WORK ADDITIONAL.

See **COMPENSATION.**

WRITTEN CONTRACT.

See **CONTRACTS, WRITTEN.**





